BY MR. ROGERS:

Q Sir, at that point you see some [224] buildings right there at Route 17 where you come out?

A Yes, sir.

Q What is that?

A I believe it's a school.

Q The school. The school?

A Yes, sir.

Q So that's the way you come out, is that right, when you go on that road from Williamsburg past the Weapons Station over to 17, and you come out right where the school is?

A Yes, sir.

Q Okay. Now, Mr. Jones, you have testified to your knowledge of what the maximum penalty is for abduction and robbery and murder in the first degree. Do you know what the maximum penalty is for capital murder?

A Yes, I do.

Q What is that?

A That's the death penalty.

Q The death penalty. Uh-huh. Mr. Jones, what is your status right now as to the death penalty?

A I don't have one, I don't think.

Q You don't have one, do you?

A No, I don't.



[225] Q That agreement that you signed with the Commonwealth took that away, didn't it?

A Somewhat.

Q Somewhat or completely?

A Well, from the State giving me the death penalty, yes.

Q Right. So the State cannot give you death penalty for the capital murder of Eric Nesbitt, can it?

A No, it cannot.

Q Because of this agreement, isn't that right?

A It is.

Q Would that affect your testimony?

A No, it would not.

MR. ROGERS: Thank you, Mr. Jones. One second.

(Defense Counsel conferred.)

MR. ROGERS: That's it, your Honor.

THE COURT: Re-redirect?

FURTHER REDIRECT EXAMINATION

BY MS. ADDISON:

Q Mr. Jones, again directing your [226] attention to that map, Commonwealth's Exhibit Number 5.

A Yes.

Q In the early morning hours of August 17th, 1996, when you went to the spot that you now know is on Crafford Road, which way did you come into that area, if you would indicate for the jury on the map?

(The witness indicated on the map.)

THE COURT: He pointed to the lower portion. Is that – is that in the other part of the map, that lower block, is that in the other part of the map as well?

MS. ADDISON: He's indicating, I believe, the dark line as the road going through there on the left-hand side.

THE COURT: Right. On the lower block. The block – the part that's blocked.

MS. ADDISON: He pointed to both, your Honor.

THE COURT: How about the part that's not blocked in at the bottom, is there –

MS. ADDISON: Yes, sir.

THE COURT: Is that superimposed, that squared area on the bottom?

MS. ADDISON: No, sir. No, sir, it's [227] not enlarged, it's just marked –

MR. SAUNDERS: The box is superimposed on the map.

THE COURT: That's what I'm asking.

MS. ADDISON: Oh, okay, I'm sorry.



THE COURT: Because if it isn't, the map is wrong.

MR. ROGERS: Right. Right, your Honor, thank you.

THE COURT: Now, from the school to across from the school area to the left-hand side, show what you can. That's the area that he needs to relate it to, if he can.

MS. ADDISON: Maybe I can be a little more clearly [sic]. He has already testified that it was inside the black square, where they stopped.

THE COURT: No question.

BY MS. ADDISON:

Q From which direction did you enter that black square? Which side of the black square did you come in?

(The witness indicated on the map.)

BY MS. ADDISON:

Q Indicating on the left side?

[228] A On the left side.

Q And when you left that area, Mr. Jones, which direction did you leave going out?

A Went back out the same way, the other side (indicating).

THE COURT: The witness indicated, pointing he came in from the left and went out toward the left of the map.

BY MS. ADDISON:

Q In answer to Mr. Rogers' question, Mr. Jones, you indicated that you understand you no longer are facing a death penalty, is that correct?

A That's correct.

Q Do you consider that a benefit to you?

A No, I do not.

Q Why not?

A Number one is when I get into the system, it's no telling what's going to happen to me because I am testifying. Everybody out here knows that I'm testifying against another inmate, which can harm me, no doubt.

Q Any other reasons?

A Like I said, I wanted to testify to tell Mr. Nesbitt and their family the real truth of what happened, my mom, let her know, ease some of the pain, [229] won't ever bring him back, but help them a little.

Q Other than the retribution from other inmates, is there any other reason that you don't consider that a benefit?

A Well, number one, I have two little boys and I'm not going to be with them. They are growing up. One is going to school, and I've missed all that. I missed my father's funeral. It's a lot of things I might miss out here. So to me, I'm not going to exist anyway, so what's the difference.



MS. ADDISON: Thank you.

I have no further questions, your Honor.

THE COURT: Mr. Rogers.

MR. ROGERS: Nothing further, your Honor.

THE COURT: Before you leave the stand, Mr. Jones, put that Exhibit Number 3 back up there with a pin. If you would, without infringing upon the area where you say the gun is, would you put an arrow directed to where the gun is.

THE WITNESS: With this pen, sir?

THE COURT: Yes, with the pen.

(The witness marked on the photograph.)

[230] THE COURT: From the top or the bottom, whichever. All right. Thank you.

The witness has now identified on the exhibit.

MS. ADDISON: Commonwealth's Exhibit Number 3, I believe.

THE COURT: That's Exhibit Number 3. All right.

You can return the witness to the proper quarters.

MR. ROGERS: I wouldn't like him released, though.

THE WITNESS: You don't have to worry about that.

MR. ROGERS: Keep him available as a witness, what I mean by that, your Honor.

MS. ADDISON: Call him as your witness?

MR. ROGERS: Remains to be seen.

MS. ADDISON: Commonwealth calls Stephen Burton.

THE COURT: Stephen Burton.

THE CLERK: Stephen Burton, please come into the Courtroom. Stephen Burton.

THE COURT: He has not been sworn?

* * *

---



[Entered As Exhibit In Atkins Trial February 12, 1998]

***VIRGINIA:*** **IN THE CIRCUIT COURT FOR THE COUNTY OF YORK AND THE CITY OF POQUOSON**

| | | |
|---|---|---|
| **COMMONWEALTH OF VIRGINIA** | : | **DOCKET NO. 8230** |
| **v.** | : | |
| **WILLIAM ALFREDIC JONES,** | : | |
| **Defendant** | : | |

**MEMORANDUM OF PLEA AGREEMENT**

This Memorandum of Plea Agreement is presented to the Circuit Court for the County of York County and the City of Poquoson, in compliance with Rule 3A:8(c)(2) of the Rules of the Supreme Court of Virginia.

**PART I**

The Defendant currently stands charged with MURDER (Indictment No. 1), ABDUCTION (Indictment No. 2), ROBBERY (Indictment No. 3), and three (3) Counts of USE OR DISPLAY FIREARM IN COMMISSION OF A FELONY (Indictment Nos. 4, 5 and 6).

**PART II**

The Commonwealth of Virginia, by and through Eileen M. Addison, Commonwealth's Attorney for York County and the City of Poquoson, and the Defendant, William Alfredic Jones, with the advice and consent of his

Attorneys, Leslie P. Smith, Esquire, and Timothy G. Clancy, Esquire, hereby agree as follows:

1. The Defendant agrees to plead Guilty to all six (6) of the indictments referenced in Part I of the agreement. The Defendant also agrees that the Circuit Court for York County and the City of Poquoson has jurisdiction over these charges and, if presented, the Commonwealth's evidence would be sufficient to prove the Defendant's guilt to each charge, beyond a reasonable doubt.

2. The Defendant agrees to fully cooperate and be truthful with the Commonwealth's Attorney's Office for the County of York and City of Poquoson and the investigators and other personnel of the York County Sheriff's Department and provide all information known to the Defendant relating, in any fashion, to the abduction, robbery and murder of Eric Michael Nesbitt on or about August 17, 1996. Among other things, the Defendant agrees to:

   a. Testify truthfully and completely in any trial or other criminal proceedings brought against Daryl Renard Atkins for the criminal charges referenced in Part One of this agreement.

   b. Be reasonably available for such pretrial conferences and interviews as the Commonwealth may deem appropriate.

3. It is further agreed and understood between the Commonwealth of Virginia, the Defendant, William Alfredic Jones, and his attorneys, Leslie P. Smith, Esquire, and Timothy G. Clancy, Esquire, that if it becomes apparent, for whatever reason or from whatever source, that the Defendant has failed to be completely truthful and/or has failed to fully cooperate with the Commonwealth, as required by this agreement, the Commonwealth shall be released from all



obligations imposed upon it by the terms of this agreement. Whether the Defendant has breached any provision of this agreement shall be determined by the Court in an appropriate proceeding at which all the Defendant's disclosures shall be admissible. The Commonwealth shall be required to prove a breach of this agreement by a preponderance of the evidence.

4. If the Defendant abides by the terms of this agreement, the Commonwealth shall not utilize any truthful information provided by the Defendant pursuant to this agreement against the Defendant in any other criminal proceeding in York County, Virginia except in a prosecution for perjury, or a perjury-related offense. If the Defendant violates any provision of this agreement, however, it is specifically understood and agreed that the Commonwealth shall have the right to utilize all information given by the Defendant, together with any derivatives thereof, for such purposes as the Commonwealth deems advisable.

**PART III**

In exchange for the Defendant's cooperation as described above, and upon the Defendant's complete performance of the terms of this agreement, the Commonwealth agrees to:

1. Move the Court to vacate its finding of guilt on Indictments No. 2, 3, 5 and 6,and,

2. Subpoena an Investigator from the York County Sheriff's Department to testify regarding the Defendant's cooperation with the Commonwealth, pursuant to this agreement, and ask the sentencing Judge to consider that cooperation favorably in imposing sentence on the Defendant.

**PART IV**

It is lastly agreed and understood that this agreement extends only to the charges arising from the abduction, robbery and murder or Eric Michael Nesbitt on or about August 17, 1996, as set forth in Docket No. 8230 now pending before the Circuit Court for York County and the City of Poquoson and in no way extends to any other case against the Defendant, if any should exist. This is the only agreement between the Commonwealth of Virginia and William Alfredic Jones concerning his cooperation in this matter and there are no other agreements, deals, bargains, or understandings that modify or alter this agreement.

**PART V**

In accordance with the provisions of subparagraph (c)(1)(C) of said Rule 3A:8, the Commonwealth and the Defendant have agreed to jointly move the Court to order the preparation of a presentence report by the Parole and Probation Officer of the York/Poquoson Circuit Court and each reserves the right to argue the appropriate disposition of these cases at the sentencing hearing. All parties hereto understand and agree that the Court is not bound by and need not impose a sentence within the sentencing guidelines range, but may impose any sentence allowed by law. The Defendant understands that any estimate of the probable sentencing range under the sentencing guidelines that the Defendant may have received from the Defendant's counsel, the Commonwealth or any other source is, at most, a prediction and not a promise and is not binding on the Court. The



Commonwealth makes no promise or representation regarding what sentence the Defendant will receive and the Defendant agrees that he cannot withdraw his guilty pleas based upon the actual sentence received.

I HAVE READ AND REVIEWED THE TERMS OF THE FOREGOING AGREEMENT AND AGREE TO ABIDE BY ITS TERMS. I UNDERSTAND THE CONSEQUENCES OF MY FAILURE TO DO SO AND AM DOING SO FREELY AND VOLUNTARILY.

Agreed to this 5th day of September, 1997

/s/ William A. Jones
William Alfredic Jones,
Defendant

/s/ Leslie P. Smith
Leslie P. Smith,
Esquire
Counsel for Defendant

Leslie P. Smith for

/s/ Timothy G. Clancy
Timothy G. Clancy,
Esquire
Counsel for Defendant

/s/ Eileen M. Addison
Eileen M. Addison
Commonwealth's Attorney
York County and the
City of Poquoson

Accepted
Filed 9/5/97
Prentis Smiley Judge

# JOINT

# APPENDIX

# VOL. II

No. 00-8452 (10)

Supreme Court, U.S.
FILED

In The

# Supreme Court of the United States

DARYL RENARD ATKINS,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Virginia**

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RANDOLPH A. BEALES
Attorney General
of Virginia

PAMELA A. RUMPZ
Assistant Attorney General
*Counsel of Record*

Office of the
Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

*Counsel for Respondent*

ROBERT E. LEE
*Counsel of Record*

MARK E. OLIVE
Virginia Capital
Representation Resource
Center
2421 Ivy Road, Suite 301
Charlottesville, Virginia
22903
(434) 817-2970

CHARLES E. HADEN
2440 West Queen Street
Suite B
Hampton, Virginia 23666
(757) 825-0022

JAMES W. ELLIS
1117 Stanford Drive, NE
Albuquerque, New Mexico
87131
(505) 277-4830

*Counsel for Petitioner*

**Petition For Certiorari Filed February 1, 2001**
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VIRGINIA: IN THE CIRCUIT COURT
FOR THE COUNTY OF YORK

| | | |
|---|---|---|
| COMMONWEALTH OF VIRGINIA | : | CASE NO. 96-8229 (6) |
| VS | : | |
| DARYL RENARD ATKINS | : | |

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents during the second day of trial in the above-styled cause, held in the Circuit Court for the County of York at Yorktown, Virginia, on February 13, 1998, before the Honorable Prentis Smiley, Jr., Judge of said Court, and jury.

—oOo—

[18] Daryl Atkins

members of the jury in the box. Do you waive poll?

MR. ROGERS: Yes, your Honor, we do.

MS. ADDISON: Yes, sir.

MR. ROGERS: If it please the Court, call Daryl Renard Atkins. He has not been sworn, your Honor.

THE COURT: All right. Swear the witness, please.

(The Defendant was duly sworn.)

MR. ROGERS: Take the stand, please, sir.

---

DARYL ATKINS,

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROGERS:

Q Yes sir. Lean close to the microphone, speak up so the Judge and the ladies and [19] gentlemen of the jury can hear you.

State your name and date of birth, please, sir.

A Daryl Atkins.

Q You don't have to swallow it. Just sit comfortable. I think we can hear you.

A Daryl Atkins, 11-6-77.

Q Okay. Mr. Atkins, you are the Defendant in this matter?

A Yes, sir.

Q And as of today, you stand charged before this Court and jury with the charges of capital murder and use of a firearm in that capital murder, is that correct?

A Yes, sir.



Q Mr. Atkins, directing your attention – excuse me, before we do that, how far did you go in school, Mr. Atkins?

A Eleventh grade.

Q Okay. And what school was that?

A Bethel High School.

Q Okay. You can sit up. You can sit up. Just try and answer, I think we can hear you. There's a good sound system in here.

You went through the eleventh grade [20] at Bethel High School?

A Yes, sir.

Q And when did you complete the eleventh grade?

A What, the year?

Q Uh-huh.

A '96.

Q '96. Okay. Mr. Atkins, you have been convicted of felonies, is that correct?

A Yes, sir.

Q You have pled guilty to the four felonies related to this matter of robbery, abduction and two use of fire-arm charges in commission of those offenses that's related to this, is that correct?

A Yes, sir.

Q In addition to those, you have been convicted of twenty-one felonies, sir?

MS. ADDISON: Excuse me, your Honor I would ask that the questions not be leading.

MR. ROGERS: Okay, I'll rephrase.

BY MR. ROGERS:

Q Other than the four, how many – or how many total felonies have you been convicted of, Mr. Atkins?

A Twenty-five.

[21] Q Okay. Have you also been convicted of any misdemeanors involving stealing?

A One.

Q One. Okay. How old were you at that time?

A Thirteen.

Q Okay. Now, Mr. Atkins, directing your attention, sir, back to the evening hours of August 16, early morning hours of August 17, 1997, did you know William Jones at that time?

A Yes, sir.

Q Where, at around 11:30 that evening, did you and Mr. Jones go, if anywhere?

A Can you repeat it?

Q At 11:30 on the night of August 16, 1996, where, if anywhere, did you and Mr. William Jones go?

A To the 7-Eleven.

Q And what was the purpose of going to the 7-Eleven that evening?



A To rob.

Q And who did you come into contact with, if anybody, once you and Jones got back – got down to that 7-Eleven?

A Eric Nesbitt.

[22] Q Okay. Had you known him before that night?

A No, sir.

Q Okay. What happened in the confrontation with Eric Nesbitt?

A Me and William Jones was on the side of the 7-Eleven, and we was planning to rob somebody. And William Jones had the gun.

Q Whose gun was that?

A One of our friend's.

Q What's his name?

A Mark.

Q Okay. Okay. What happened with William Jones, who had Mark's gun?

A Then Eric Nesbitt backed out of the parking lot and was coming out the 7-Eleven parking lot. William Jones waved him down. Then he had a conversation with him. So I came up to the driver, that's where he was at, William Jones.

Q Who was at the driver's side?

A William Jones.

Q Okay. And where did you come up to?

A The driver's side.

Q Okay. What happened then?

A We started chatting for a while, and [23] then William Jones pulled out the gun.

Q Okay. What happened then?

A Then he told me get around.

Q Who told you?

A William Jones.

Q And what did you do?

A Go around in the passenger.

Q And what did you do when you got around to the passenger side?

A Got in the truck.

Q What happened then?

A William Jones got in the driver's side.

Q Okay. Where was Mr. Nesbitt seated?

A In the middle.

Q Okay. What happened now?

A He handed me the gun with both of his hands and I hold the gun. And then William Jones drove off.

Q Okay. Where did you go?

A To Sacramento Drive.



Q Okay. And what happened then?

A He was speeding, so he turned the corner and hit a parked car.

Q What happened – on which side of [24] the truck hit the parked car?

A The right.

Q The right side of the parked car. What side of the pickup truck was hit?

A The left. The driver's side.

Q The driver's side. Okay. Okay What happened after that?

A Then I asked Mr. Nesbitt did he have any money. Mr. Nesbitt say yes. He handed me his wallet. I looked in his wallet, and it was sixty dollars.

Q What did you do with that sixty dollars?

A I took it out of his wallet.

Q What did you then do to the wallet?

A I gave it back to him.

Q Okay. What happened after that?

A Then I looked back in it. And then William Jones glanced back at it and he saw the credit card in there.

Q Okay. What did y'all do then?

A He asked him did he have any more money in the bank.

Q What did y'all do after that?

A We rode to the bank.

[25] Q Who was driving?

A William Jones.

Q Okay. Was that the bank that was pictured in the big chart as being the Crestar over at the Coliseum Crossing in Hampton?

A Yes, sir.

Q And this – before this had been down by the 7-Eleven near Tidemill Apartments on Sacramento?

A Yes, sir.

Q Okay. All in Hampton?

A Yes, sir.

Q Tell me what happened when you all got to the – to the Crestar Bank.

A Then Eric Nesbitt took out his credit card. He leaned over William Jones, placed his credit card, you know, in the machine. Then he hit the numbers and then he got the money back.

Q Okay. Do you know how much money came back?

A Two hundred.

Q Two hundred dollars?

A Uh-huh.

Q Okay. What was done with the money?

A He gave it to me.



[26] Q Who gave it to you?

A Eric Nesbitt.

Q Eric Nesbitt did?

A Uh-huh.

Q What did y'all do then?

A We drove off, William Jones.

Q Where was the gun?

A I still had it.

Q You had it. Okay. Jones drove off then, is that right?

A Uh-huh. Yes, sir.

Q Where did y'all drive to?

A He drove to the interstate. And it was a discussion of he was going to tie him up, there was a discussion that me and him was going to tie him up and leave him somewhere. But then William Jones said that he know a place and he never told me. And he just drove.

Q Okay. Now, where was he driving? On what road, if you know, at the time this discussion took place about he knew a place?

A On the interstate.

Q On the interstate, Interstate 64?

A Yes.

Q Which direction was that heading, [27] Mr. Atkins, up towards Williamsburg or down towards the bridge tunnel?

A Towards Williamsburg.

Q Okay. Describe what happened on the trip, and where you went and where Jones drove after you were heading up in the direction of Williamsburg on I-64.

A Well, we got off at Lee Hall exit. And we came to the – a stop light and there was a 7-Eleven across the street. Then we drove across the intersection. Then we made a right down a long street. And then –

Q Do you know which street that was?

A I do now.

Q Did you know that night what street it was?

A No, sir.

Q Okay. What street do you now know that to be?

A Crafford Road.

Q Okay. Had you been down that road before?

A No, sir.

Q Okay. Who was driving?

A William Jones.

[28] Q Who was giving directions, if anybody, as to where to go?

A William Jones.

Q Okay. Tell the ladies and gentlemen of the jury what happened after that, after you drove down Crafford Road.

A We got on – we got on Crafford Road and William Jones drove halfway up the street, he stopped. He told



me to get out, me and Eric Nesbitt to switch places. He never said why. So I hand – he told me to hand him the gun. I hand him the gun. I got out first. Eric Nesbitt got out behind me. I got back in. Eric Nesbitt got back in. William Jones still had the gun. He put it in a holster that he had on his belt, a black nylon holster.

Then he drove up the street a little more. And then I noticed it was like a fork in the road. So then he stopped and backed up. And then he backed up, parked the car, and he opened up the door.

Q Which door?

A The driver door.

Q Okay. What happened then?

A He told Eric Nesbitt to get out.

Q And what happened at that point?

A Eric Nesbitt got out.

[29] Q Which side of the vehicle did Nesbitt get out of?

A The passenger.

Q Who opened the passenger door?

A Eric Nesbitt.

Q Okay. Where were you at that time?

A In the middle.

Q What happened then?

A As Eric Nesbitt was getting out, William Jones got out, too. So by the time Eric Nesbitt got out the

vehicle, William Jones was there. He had came around the back of the truck.

Q What happened then?

A He – Eric Nesbitt bend over and William Jones told him to get up. And he didn't get up. And then the shooting started.

Q Who was shooting?

A William Jones.

Q Could you see the gunshots?

A I saw the flashes.

Q The flashes? How many guns were out there, Mr. Atkins?

A One.

Q And who had that gun?

A William Jones.

[30] Q Do you know how many – approximately how many shots were fired?

A There was a lot.

Q Okay. And where were you when all these shots were fired?

A In the middle.

Q In the middle of what?

A In the middle of the Nesbitt truck.

Q So you were still in Mr. Nesbitt's truck?



A Yes, sir.

Q Okay. Were you on the driver's side, passenger side, or where?

A The passenger side.

Q What happened then? The shots had started firing, what happened then?

A Then I felt – my leg was hurting, so I reached down to look at my leg.

Q Which leg was that, sir?

A My left.

Q Okay. Where on your left leg?

A On my – on the top.

Q The top of your left leg?

A The top of my ankle.

Q The top of your ankle. Okay. What [31] happened then?

A Then I didn't hear no more shots. And then William Jones got inside the driver's – he came back around, got inside the driver's and took off.

Q Took off. Okay. What did – did you and Mr. Jones have any conversation at that point?

A I asked him why did he shoot him. He told – he didn't answer. And then he kept saying how did he shoot me. He was trying to figure out how did he shoot me.

Q Who was trying to figure out how he shot you?

A William Jones.

Q William Jones was trying to figure how he shot you?

A Yes, sir.

Q Okay. Had there been any conversation between you and Jones as to your being shot?

A I told him to take me – I asked him, William Jones to take me to the hospital.

Q Okay. Was there any talk about why you would want to go to the hospital?

A Because my leg was hurting.

Q From what?

[32] A From the bullet.

Q Okay. Did y'all have a pleasant conversation with one another?

A No, sir.

Q Okay. Who was driving at that point?

A William Jones.

Q Okay. And where did he drive to?

A The hospital.

Q Okay. At the time before you left that area off of Crafford Road, did you see Mr. Nesbitt, after the shots?

A Oh, no.

Q You didn't?



A Huh-uh.

Q Had you gotten out of the vehicle?

A No, sir.

Q Did you ask or have any conversation with Mr. Jones about Mr. Nesbitt after all the shots had rang out?

A Yes, sir.

Q Okay. And what conversation was that?

A I asked him where did he shoot him at. He said he shot him in the body.

[33] Q Where did he then take you?

A To Riverside Hospital.

Q All right. Did you receive treatment at Riverside Hospital?

A Yes, sir.

Q Were x-rays taken of you at Riverside Hospital?

A Yes, sir.

Q Okay. What kind of story did you tell them at Riverside when you got in there that night?

A I told them that I got robbed.

Q Was that the truth?

A No, sir.

Q Why did you tell them that?

A Because I didn't want them to know I was involved with a robbery.

Q Mr. Atkins, after – when were you arrested – excuse me, when were you arrested on charges of murder and robbery and abduction?

A August the 21st, 1996.

Q Of 1996? At the time you were arrested, did – you were arrested by the police including York County Investigator Troy Lyons?

A Yes, sir.

[34] Q Do you know what it means to be advised of your Miranda Rights?

A Yes, sir.

Q Did that occur?

A Yes, sir.

Q Okay. Did you then, after you were read those rights, did you make a statement to the police?

A Yes, sir.

Q Okay. And what did you tell them in the statement, basically?

A I told them that William Jones pulled the trigger.

Q Okay. Did you make any statements about the robbery?

A Yes, sir.

Q Did you make any statements about the abduction?

A Yes, sir.



Q Did you make any statements about the killing of Eric Nesbitt?

A Yes, sir.

Q And this was on August 21st, 1996?

A Yes, sir.

Q Did you – did you make a statement [35] that you were or were not involved in the killing of Eric Nesbitt?

A Yes, sir.

Q Yes, sir, what?

A I told them that I won't involved, that I didn't kill him.

Q That you didn't kill him?

A Yes, sir.

Q Did you tell them who the triggerman was?

A Yes, sir.

Q And who was that?

A William Jones.

Q Have you ever made any statement to the contrary since August 21, 1996, all that time between then and now, that anyone else shot Eric Nesbitt?

A No, sir.

Q At the time of that statement, were you aware of any other statements that had been made by any other individuals that ended up being involved in your case?

A No, sir.

Q Did you have any information at that time of any lab reports?

[36] A No, sir.

Q Or what evidence that the Commonwealth and the Police Department may have?

A No, sir.

Q Do you know what type of murder or what degree of murder you were charged with first?

A First degree.

Q First degree. Okay. Was that later changed?

A Yes, sir.

Q To what?

A Capital murder.

Q Okay. And that's what you're still charged with today?

A Yes, sir.

Q Had you made yourself available and stated your agreement to be a witness for the Commonwealth in these matters?

A Yes, sir.

MS. ADDISON: Your Honor, again, this is an area that was discussed in pretrial motion.

MR. ROGERS: I don't –



MS. ADDISON: If I might –

THE COURT: Okay. The same concern that you had before?

[37] MS. ADDISON: Yes, sir.

THE COURT: All right. Would you come up here, please, ma'am, to the side bar.

(The Court and counsel for both sides and the Court Reporter went to side bar.)

MS. ADDISON: Your Honor, again, we have discussed repeatedly that he's going into an area about the charging decisions and the Commonwealth's theory of who was the triggerman in this case and why it was changed and when it was changed, and the fact that we initially had him charged with first degree and then later changed it to capital. And he gets into that whole area that we discussed. Again, he's going to argue why it was changed and what the Commonwealth or law enforcement officers believed initially and what they learned later on.

MR. ROGERS: If it please the Court, my question to Mr. Atkins was, did you make yourself available and agree to testify for the Commonwealth.

THE COURT: That's the question.

MR. ROGERS: That has nothing to do with what the Commonwealth does, or says, or their opinions, or what they do or do not want to do. It's what's in his mind and what he believed, solely.

[38] MS. ADDISON: Additionally, he's still leading this witness by the hand. He's testifying, not the witness.

THE COURT: I can stop that part of it. The question is innocuous and does no harm. Let's address –

MS. ADDISON: The next question across, did the Commonwealth ever tell you that you were going to be a witness, putting my office as a witness right back in that same position I'm being put in of having someone from my office to testify as to how we planned to proceed, whether or not we ever believed him and whether or not we ever intended to use him as a witness.

MR. ROGERS: No, we are proscribed by the Court's ruling –

MS. ADDISON: Well, it looks like that's the direction you're going.

MR. ROGERS: – I've asked the question if he was – if he made himself available to the Commonwealth to testify. And I think that's a proper question. I think he has a right to make that answer. And I don't intend to go any farther with it.

THE COURT: All right. Fine. leading him. You know how to ask the questions, who, [39] what, why, where and when.

MS. ADDISON: I object to every single question. Every question is leading. It makes it look bad on me.

MR. ROGERS: After the next question he's going to be yours.



(The Court, counsel for both sides and the Court Reporter returned from the side bar.)

THE COURT: You may repeat the question.

MR. ROGERS: That would be my request, if the Court please, that the Court Reporter repeat the question, so the precise question is given.

THE COURT: Thank you.

(The Court Reporter read the pending question and answer.)

THE COURT: All right. Next question.

MR. ROGERS: If I could have just a moment.

(Defense Counsel conferred.)

MR. ROGERS: Just one more question.

BY MR. ROGERS:

Q Again, with the repeat, Mr. Atkins, [40] and that is, who shot Eric Nesbitt?

A William Jones.

Q Did you shoot a gun that night of August 17, 1996?

A No, sir.

MR. ROGERS: Answer any questions that the Commonwealth may have.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MS. ADDISON:

Q Mr. "Jones," you said you have been convicted of how many felonies?

THE COURT: This is Mr. Atkins.

MS. ADDISON: I'm sorry.

Mr. Atkins. Looking at my note.

BY MS. ADDISON:

Q Mr. Atkins, in answer to your attorney's questions you think you've been convicted of how many felonies?

A Twenty-five.

Q That includes the ones involved in this case?

A Yes.

[41] Q Are you sure?

A Yes.

Q In answer to Mr. Rogers' questions, you talked about a statement that you gave on August 21st of 1996 to Investigator Lyons.

A Yes, ma'am.

Q Do you recall that? You said you told him the truth about what you had done with the robbery and the abduction?

A Yes.



Q Right? You told him the truth about what had happened?

A Yes, uh-huh.

Q Didn't you, in fact, during that statement, Mr. Atkins, say that you had gotten shot in the leg when you jumped in front of the gun to try to save Mr. Nesbitt's life?

A Yes.

Q That wasn't the truth, was it?

A No.

Q Didn't you also tell them during that statement that Mr. Jones had kidnaped you at gunpoint and made you get in the truck?

A Yes.

Q Was that the truth?

[42] A No.

Q Didn't you also, Mr. Atkins, tell them that you never held the gun and that Mr. Jones had the gun on Mr. Nesbitt while you were at the bank?

A Yes.

Q Was that the truth, Mr. Atkins?

A No.

Q Didn't you tell them during that statement that you didn't know anything about any intent to rob anyone before you went to the 7-Eleven?

A Yes.

Q But this morning you say that you and Mr. Jones went there for that purpose?

A Yes.

Q Which one is the truth, Mr. Atkins?

A We planned to rob somebody.

Q Where were you when you made that plan?

A On the way to the 7-Eleven.

Q So what you told the investigators on August 21st of 1996 wasn't the truth, was it?

A No.

Q Didn't you also, on August 21st of 1996, tell the investigators that you had no idea where Mr. Jones had gotten the gun? Do you recall making [43] that statement, Mr. Atkins?

A No. No.

Q You don't? Do you recall telling them that you got shot once in the leg, that you only heard one shot?

A No, I don't remember that.

Q You told them repeatedly on August 21st of 1996, did you not, Mr. Atkins, that you never had that gun in your hand?

A Yes.

Q Was that the truth, Mr. Atkins?

A No.



Q You told them, did you not, on August 21st that when you were at the bank Mr. Jones had the gun pointed at Mr. Nesbitt?

A Yes.

Q Was that the truth, Mr. Atkins?

A No.

Q Your testimony here today is that Mr. Jones pulled the gun and told you to get in the truck, is that correct?

A Yes.

Q And then he handed you the gun with both hands?

A Yes.

[44] Q And where were you when he handed you the gun?

A In the passenger seat.

Q And where was Mr. Nesbitt?

A In the middle.

Q So you're telling this jury that he handed the gun across in front of Mr. Nesbitt to you?

A Yes.

Q And Mr. Nesbitt did nothing?

A Yes.

Q Today you said that after the money was withdrawn from the bank that Mr. Nesbitt gave you the two hundred dollars, is that right?

A Yes.

Q Do you remember what you told Investigator Lyons on August 21st of 1996 what happened to that money?

A No.

Q Isn't it a fact, Mr. Atkins, that you told Investigator Lyons on August 21st that all that money was given to William Jones?

A Yeah, I might have told him that.

Q You might have told him that? Was that the truth?

A No.

[45] Q No, it was not. Are you sure? Was that the truth or what you're saying today the truth?

A What I'm saying today is the truth.

Q And where did this gun come from?

A Mark.

Q Mark?

A The guy that lived behind me.

Q What's Mark's last name?

A Dallas.

Q Mark Dallas. And how long have you known Mark Dallas, Mr. Atkins?

A Since I've been living with my father.



Q And how long is that?

A Three months.

Q Isn't it a fact that Mr. Dallas is your friend?

A No.

Q But he came to your apartment, did he not?

A He's me and Mr. Jones' friend.

Q He's your friend as well, is that right?

A Yes.

Q Well, you testified earlier that he [46] was Mr. Jones' friend?

A I said me and Mr. Jones' friend.

Q He was both. But you know his last name?

A Yes.

Q And you testified here today that that's where the gun came from?

A Yes.

Q But you didn't know that on August 21st of 1996, is that correct?

A I might have said that.

Q You might have said that you didn't know where the gun had come from? Isn't it true that on August 21st of 1996 you told Investigator Lyons that William Jones brought that gun to your apartment?

MR. ROGERS: You have to answer.

THE WITNESS: Yes, I said that.

BY MS. ADDISON:

Q Was that the truth or what you're saying today the truth, Mr. Atkins?

A What I'm saying today is the truth.

Q But you told me on my very first question that you told them the truth on August 21st of 1996, did you not?

A Yes.

[47] Q So what you told me was not the truth, is that the right answer?

A No, what I said in that statement.

Q What you said in the statement is the truth?

A No.

Q It's not the truth?

A Yes.

Q Do you remember what the gun looked like, Mr. Atkins?

A Marble handle.

Q Marble handle?

A Brown marble handle.

Q And how do you know what it looked like?

A Because I saw it.

Q You held it, did you not?



A Yes.

Q You held it all the time you were in that truck?

A Not all the time.

Q Not all the time. You had it at the bank, didn't you?

A Yes.

Q But that's not what you told them [48] August 21st of 1996?

A Yes.

Q So you lied on August 21st of 1996?

A Yes, I have.

Q And you lied to the hospital, didn't you, on August 17th, when you got there, told them that you had been shot right outside the hospital?

A Yes.

Q You lied then, didn't you?

A Yes.

Q And when Officer Tutone came and you could have told him about Eric Nesbitt laying out on Crafford Road, you didn't tell him the truth, did you?

A No.

Q You told him what, that you had been robbed by Deer Park and shot?

A Yes.

Q And told him you had hopped on one leg for almost two miles?

A Yes.

Q Was that the truth, Mr. Atkins?

A No.

Q No, it was not. Were you ever near Deer Park during those hours?

A No.

[49] Q That wasn't the truth either, was it?

A No.

Q Do you recall on August 21st of 1996 telling Investigator Lyons that you were afraid William Jones was going to shoot you?

A Yes. Yes.

Q That's why you didn't tell Officer Tutone the truth?

A Can you repeat the question?

Q Did you not tell Investigator Lyons on August 21st of 1996 that the reason you lied to Nurse McIntyre at the hospital and the reason you lied to Officer Tutone was because you were afraid of William Jones, that he was going to come and shoot you?

A Yes.

Q But you were in the safety of a hospital, were you not, Mr. Atkins?



A Yes.

Q You had a police officer right there that you could have told the truth to?

A Yes.

Q But you didn't, did you?

A No.

Q Do you recall telling Investigator [50] Lyons on August 21st of 1996 that the gun was black with a brown handle?

A Yes.

Q But you say today it was a marble handle?

A Marble brown.

Q But you didn't tell Investigator Lyons that on August 21st, did you?

A I told him that it was a brown handle.

Q Do you know the difference between marble and brown?

A No.

Q No, you don't?

THE COURT: Answer the question, Mr. Atkins.

THE WITNESS: No, I thought they were the same.

BY MS. ADDISON:

Q You thought that brown and marble was the same. Did you think that a .22 and a .380 was the same?

A Huh-uh. No.

Q What type of gun was it, Mr. Atkins?

A A .380.

[51] Q A .380. Do you recall on August 21st of 1996 you told Investigator Lyons it was a .25 or a .22?

A No, I don't recall saying that.

Q You don't recall that.

Page six, counselor.

"Lyons: Was it a revolver or was it a semiautomatic?

"Atkins: I'm not sure what it – I'm not sure what it was. It was a small – I know it was either a .25 or a .22, something like that."

Do you recall saying that now, Mr. Atkins?

A Yes.

Q But that's not what it was, was it?

A No.

Q And that wasn't the truth?

A No.

Q And you knew when you were holding that gun on Eric Nesbitt at the bank that it wasn't a .22?

A Yes.

Q But you didn't tell Investigator Lyons the truth, did you, Mr. Atkins?

A No.



[52] Q Do you recall telling Investigator Lyons, "I ain't going down for nothing"?

A No, I don't remember that.

Q Page 12.

MR. ROGERS: If the Court please, we have one difficulty with the Commonwealth's approach on this, and that is it's taking bits and pieces. I would make a proffer that the reference that the Commonwealth made on the bottom of page six, had she read the next question and the Defendant's next answer it might have brought a little clarity to the situation as to the caliber. And, therefore, I object to this piecemeal approach.

THE COURT: You may have your opportunity to redirect, –

MS. ADDISON: Thank you, your Honor.

THE COURT: – Mr. Rogers.

MS. ADDISON: If I might have Commonwealth's Exhibit 3.

BY MS. ADDISON:

Q You've seen this photograph before, have you not, Mr. Atkins?

A Yes.

Q Do you recognize that photograph?

A Yes.

[53] Q And that is you in that picture, is it not?

A Yes, it is.

Q And what do you have in your hand, Mr. Atkins?

A A gun.

Q The gun that you told Investigator Lyons you never held at the bank, isn't that true?

A Yes.

Q Let's talk about your testimony here today, Mr. Atkins. Your statement is that you and Mr. Jones planned a robbery and you walked up to the driver's side where Mr. Jones was already standing, chatting with Mr. Nesbitt, is that what you said?

A Yes.

Q And Mr. Jones pulled the gun and told you to go around?

A Yes.

Q He didn't point the gun at you at that point, did he?

A No.

Q Not like you told Investigator Lyons on August 21st, that wasn't the truth, –

A No.

Q – nobody ever pointed the gun at [54] you, did they?

A No.

Q Nobody forced you to do anything, did they?

A No.



Q You're saying that you hit a parked car on the right side?

A Yes.

Q And your testimony here today was that you took the cash from Mr. Nesbitt's wallet, is that right?

A Yes.

Q Do you recall on August 21st of 1996 you told Investigator Lyons that it was Mr. Jones who took the cash from Mr. Nesbitt?

A No, I didn't say that.

Q You didn't say that? Are you sure of that?

A I don't recall it.

Q You don't recall.

And you say that Mr. Jones had some sort of holster for this gun of Mark's?

A Yes.

Q Where was that holster, Mr. Atkins?

A On the belt of William Jones.

[55] Q On his belt?

A Uh-huh, yes.

Q He had a holster attached to his belt?

A Yes.

Q And you're saying that you had the gun now, that's your story today, you have the gun –

A I had the gun at the ATM.

Q When did you first get the gun, Mr. Atkins?

A When we got in the truck.

Q When you got in the truck. Oh, when he handed it to you across in front of Mr. Nesbitt?

A Yes.

Q And you held it on Mr. Nesbitt from the 7-Eleven through the residential area where you hit the parked car, isn't that right?

A Yes.

Q And you held it on Mr. Nesbitt all the way to the bank?

A Yes.

Q And that picture of you shows you holding it on him at the bank?

A Yes.

Q And you continued to hold it on him [56] all the way to York County, didn't you?

A Yes.

Q But that's not what you told Investigator Lyons on August 21st of 1996, is it? That's not the same story, is it, Mr. Atkins?

A No.

Q And your story here today is that you got to Crafford Road and Mr. Jones told you to give him the gun?



A Yes.

Q And how did you do that?

A You want me to demonstrate?

Q I want you to describe it, please.

A I hold the gun like this (demonstrating).

Q In both hands, and you swung it out in front of you, in front of Mr. Nesbitt?

A Yeah.

Q Who sat quietly and did nothing?

A Yes.

Q And Mr. Jones was driving at that point?

A No.

Q He had stopped?

A Yes.

[57] Q I see. And where had he stopped?

A On Crafford Road.

Q On Crafford Road. Do you know where on Crafford Road?

A Before we got – before he got to the fork.

Q And your testimony is he then put the gun in the holster, is that right?

A When I gave it to him?

Q Yes, sir. That's what your testimony was. Jones told me to give him the gun. I gave it to him and he put it in the holster.

A No, that ain't true.

Q Do you know what's true, Mr. Atkins?

A Yes.

Q Is it like you told Investigator Lyons on August 21st, that you never had the gun, or is it that Mr. Jones gave it to you and then took it back and put it in a holster, or is it that you had the gun still at that time?

A I gave it to Mr. Jones.

Q You gave it to Mr. Jones. But you don't know what he did with it now?

A He didn't put it in the holster.

Q He didn't. A few minutes ago you [58] testified that he put it back in the holster.

A I didn't say that.

Q You didn't say that. And then you testified that you got out of the truck and Mr. Nesbitt got out of the truck?

A Yes.

Q And you're standing in the woods in the dark on Crafford Road. And then what happened, Mr. Atkins?

A Then he – I got back in the truck.

Q You got back in the truck?

A Yes.

Q And then what happened?

A Eric got back in the truck.



Q You're telling this jury that a 21-year-old, fit man, military trained, Boy Scout, hiking, camping, voluntarily got back in that truck with you and Mr. Jones?

A Yes.

Q And then you drove down the road further?

A Yes.

Q How fast were you going?

A I don't know.

Q You don't know. Were you going [59] fast, slow, do you have any idea?

A Not really fast.

Q Not really fast. And the gun was in the holster at that point?

A Yes.

Q He wasn't crammed in that little truck with the three of you with a gear shift lever and holding a gun, was he?

A No.

Q The gun had been put away, is that your testimony?

A Yeah.

MR. ROGERS: If the Commonwealth could make clear who the he is. We have three people – two other people besides the Defendant. And she's saying he –

MS. ADDISON: I'll be happy to do that, your Honor.

BY MS. ADDISON:

Q Mr. Jones is driving, is that your testimony?

A Yes.

Q And he was driving Mr. Nesbitt's little truck?

A Yes.

[60] Q And it's your testimony at this point you all had gotten out and you had gotten back in the middle and Eric Nesbitt had gotten right back in with you, so you were in between the two of them?

A Yes.

Q With that gear shift lever right up by your legs, or in between your legs, probably, right?

A Yes.

Q Where was it, do you recall?

A I don't think it was in between my legs.

Q Were your legs on the right-hand side of it or the left-hand side of it?

A The right.

Q And Mr. Jones wasn't shifting gears and driving and holding that gun on Mr. Nesbitt anymore, was he?

A No.

Q And you're saying you didn't have the gun anymore?

A Yes.



Q Is that correct?

A Yes.

Q And Mr. Nesbitt didn't try to jump out?

[61] A No.

Q He just sat there and rode along with you?

A Yes.

Q And then your testimony is Mr. Jones stopped the truck again?

A Yes.

Q And he got out of the driver's side?

A He stopped and backed up.

Q Okay. After he backed up and stopped the truck –

A Uh-huh.

Q – you testified that he got out the driver's side?

A Yes.

Q You didn't mention any trouble he had in doing that, did you?

A He got – he had trouble.

Q He had trouble? How did he get the door open, Mr. Atkins?

A He asked Eric Nesbitt to open it.

Q And Mr. Nesbitt was inside the truck or outside by then?

A He was still inside.

Q He was still inside. He was on the [62] other side of the seat, you were in between?

A Yes.

Q And Jones asked Nesbitt to open the driver's side door for him?

A Yes.

Q Did he get out and come around and open it up?

A No.

Q How did he open it up for him?

A He leaned over me.

Q So he reached across both of you, knowing that Mr. Jones couldn't get the door open, knowing that the gun was in the holster, he reached across – leaned over both of you and opened the door for Mr. Jones, is that right?

MR. ROGERS: If the Court please – excuse me, Madam Commonwealth. Objection to the form of the question. One, she's included about three or four questions in one, and now is getting into the knowledge and the mind of Eric Nesbitt, knowing that the gun was in the holster. There's no evidence whatsoever that Eric Nesbitt knew that the gun was in William Jones' holster.

THE COURT: Overrule your objection.

MR. ROGERS: Note exception for the [63] record.



THE COURT: Note your exception.

BY MS. ADDISON:

Q You couldn't see the gun at that point, could you, Mr. Atkins?

A No.

Q And, fair statement, that if you couldn't see it right next to Mr. Jones, Mr. Nesbitt probably couldn't see it either, could he?

A No, he couldn't.

Q Thank you. But it's your testimony here that he just reached across – leaned across both of you and helped Mr. Jones get out of the truck so he could come around and shoot him?

A Yes.

Q He didn't open his door and jump out and run into those woods?

A No.

Q And you're saying Mr. Nesbitt then got out of the passenger side and didn't run, he bent down and waited for Mr. Jones to come around and start shooting him?

A No.

Q No? Your testimony was that he got out and just bent down?

[64] A No, I said he got out and then William Jones came around and then he bent down.

Q Oh, after Mr. Jones came around?

A Pointed the gun at him.

Q So before he came around, Mr. Nesbitt stood there and waited for him, is that right?

A Yes.

Q Okay. And you were still sitting in that passenger seat in the middle of it?

A Yes.

Q And how many shots did you hear?

A A lot.

Q A lot. Can you be more specific about a lot?

A It was more than five, I know.

Q More than five. How many did you hear before you got shot in your leg?

A I don't know.

Q You don't know. Did you hear any after you got shot in your leg?

A I don't know.

Q You don't know. Do you recall telling Investigator Lyons on August 21st of 1996 that, no, you hadn't jumped – you changed your mind, you [65] hadn't jumped in front of the victim to save his life, you decided you had been in the truck, but you didn't hear any shots after you got shot?

A Yes.

Q Now you don't remember?



A I said I didn't hear no shots because my leg was hurting.

Q And that affected your hearing?

A Yes.

Q And at the time you got shot your testimony is that your left leg was next to the middle of that truck, is that right?

A Yes.

Q Because they are on the right side of the gear shift?

A Yes.

Q In the middle of that truck?

A Yes.

Q Next to the transmission hump?

A Yes.

Q And you didn't move it?

A No. I was – yeah, I was moving it.

Q You were moving it?

A Yeah.

Q Did you move it over to the driver's [66] side where Mr. Jones had gotten out and run out there?

A No, I was going towards the passenger – I was about to come out and then the shot – the shooting started.

Q You were about to come out?

A Uh-huh.

Q But your leg was inside?

A My whole body was inside.

Q Your whole body was inside. So you were thinking about getting out, but you hadn't done it yet, right?

A Yes.

Q You said you never saw Mr. Nesbitt again after you heard the shots, is that right?

A Yes.

Q He had moved so far away from the truck that you couldn't see him anymore, is that your testimony?

A No.

Q You just couldn't see him?

A Yes.

(The attorneys for the Commonwealth conferred.)

BY MS. ADDISON:

Q If you might, Mr. Atkins, if you [67] can, describe or show us how you saw Mr. Nesbitt bent over after Mr. Jones came around the truck.

A Describe?

Q Can you describe how he bent over?

A He humped over.

Q Well, can you be a little more descriptive? How were his legs?



A Excuse me?

Q His legs, how were they, were they touching the ground, were they just bent or what?

A They was just bent.

Q Was he touching the truck?

A He was leaning against the truck.

Q Leaning against the truck. Not against the seat, though?

A No, not against the seat.

Q And was covering up his face, wasn't he?

A He was balled up. I don't know if he was covering up his face.

Q You couldn't see his arms?

A No.

Q He was begging not to be shot anymore, wasn't he?

A Yes.

[68] Q You heard that?

A Yes.

Q But you couldn't hear the shots, right?

MR. ROGERS: Your Honor, if the Commonwealth –

BY MS. ADDISON:

Q Your testimony –

MR. ROGERS: Excuse me, Madam Commonwealth. If she could identify what time she's making reference to, if it's during all the shots, if it's during the shot when he felt the pain in his leg, or some other unspecified time. To ask a generic question, and you couldn't hear the shots, there's no way to answer that question, your Honor, without specifying a time.

MS. ADDISON: I'll withdraw the question.

BY MS. ADDISON:

Q Mr. Atkins, I'm going to ask you the first question I asked you when I started this examination, which you answered yes. Did you tell the truth on August 21st of 1996 to Investigator Lyons?

A I didn't tell him the whole truth.

Q You didn't tell him the whole truth. [69] You didn't tell him much of any truth, did you, Mr. Atkins?

A Yes, I did tell him.

Q You lied to him about a whole number of things, didn't you?

A Yes.

Q And you lied to the nurse at Riverside Hospital about where you got shot, didn't you?

A Yes.

Q And you lied to Officer Tutone about where you were when you got shot, too, didn't you?

A Yes.



Q And you're lying here today, aren't you, Mr. Atkins?

A No.

MS. ADDISON: I have no further questions, your Honor.

THE COURT: Redirect?

MR. ROGERS: Thank you, your Honor.

REDIRECT EXAMINATION

BY MR. ROGERS:

Q Mr. Atkins, when you were shot in [70] the leg, did it leave scars?

A Yes.

Q Are those still visible?

A Yes.

MR. ROGERS: Your Honor, I'd request that the Defendant be able to come down and show the scars on his leg to the jury.

THE COURT: All right. I'll grant that.

MR. ROGERS: Come down, Mr. Atkins.

(The Defendant stepped down from the witness stand.)

THE COURT: You need to stand out further, probably, from the jury so the entire jury panel can see you.

MR. ROGERS: Yeah, move out here, Mr. Atkins. Okay. Pull your pants leg up.

THE COURT: If you all want to come to the rail, you may.

(The witness indicated his leg.)

THE COURT: Does he still have his shoe on? I can't tell.

MR. ROGERS: No, he has taken it off, your Honor. Your Honor, if we could describe for [71] the record –

THE COURT: I'll let you do that, if you like.

MS. ADDISON: Your Honor, there is a – a lot of this already in the record, your Honor.

MR. ROGERS: If the Court please, if I could describe it, there is a scar visible immediately above the left inside ankle bone of the Defendant, Mr. Atkins.

MS. ADDISON: Your Honor, if I might, since there is a ruler that's been admitted into evidence in the case, rather than Mr. Rogers' description of immediately above, we might have something more accurate in measurement.

MR. ROGERS: Okay. I will even accede to the Commonwealth and ask her if she would prefer me to do it from the floor or from the bottom of his foot or where?

THE COURT: Would the Commonwealth like to describe the wound?

MR. ROGERS: Fine. I'll be glad to let the Commonwealth describe it.

Go ahead, Madam Commonwealth.



MS. ADDISON: No, thank you. This is your demonstration.

[72] THE COURT: Allow him to do it then.

MS. ADDISON: Your Honor, I'm simply trying to get something in the record that makes sense to someone reading it.

THE COURT: Certainly.

MR. ROGERS: If the Court please, for matters of the record, Joint Exhibit Number 2, which is a 12-inch and multicentimeter – millimeter and, gosh, I don't know which one I'm going to ask him.

THE COURT: Inch.

MR. ROGERS: Inch. Thank you, your Honor.

Okay. Now, placing the end of this ruler with the number zero at the bottom, the lower scar on the inside – if the Court please, I need to take off the tag so that we can get to that number. From the floor, there is – does it look like four-and-a-half inches? Okay. With the help of the Assistant Commonwealth Attorney, Mr. Hahn, from the floor the lower inside of Mr. Atkins' –

MR. HAHN: Probably closer to four-and-a-quarter inches.

MR. ROGERS: Okay. Four-and-a-quarter inches from the floor to the lower scar and from the floor to the higher scar is –

[73] MR. HAHN: Seven-and-three-fourths.

MR. ROGERS: Again, with the Commonwealth Assistant helping me, seven-and-three-quarters inches from the floor.

Mr. Atkins, if you could turn the other way, now, is there a scar visible on the outside of your leg here?

THE DEFENDANT: Yes.

MR. ROGERS: Could you point to that for the jury.

(The Defendant indicated.)

MR. ROGERS: Okay, the witness has pointed to a scar which I am now measuring, if the Court please, using the inch ruler, Mr. Commonwealth, if you would help me again. From the floor to that scar?

MR. HAHN: It's six.

MR. ROGERS: Six inches from the floor. Six inches from the floor.

Okay. Thank you, sir. That's all the questions I have. You can put your sock and shoe back on.

THE COURT: Any recross, Ms. Addison?

MS. ADDISON: About his [74] demonstration?

THE COURT: Anything, whatever?

MS. ADDISON: No, sir.

THE COURT: You may have a seat beside your lawyer.

Next witness.



MR. ROGERS: The Defense rests, your Honor.

THE COURT: Defense rests. Rebuttal?

MS. ADDISON: No, sir.

THE COURT: All right. Ladies and gentlemen of the jury, that now concludes the evidence, both the Commonwealth's evidence and the Defense evidence. The Court will need some time to assemble the instructions relative to the law, which I will instruct you on. I suggest it may take twenty minutes or so.

MS. ADDISON: Your Honor, I have printed drafts of what I believe we'll need, but I have not had an opportunity to talk with Mr. Rogers to see what they might want or what we can agree on or not agree on.

MR. ROGERS: I think most of these are fairly standard Model Jury Instructions.

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[Guilt Verdict]

[149] your Honor.

THE COURT: Would you be kind enough to hand the verdict to the Bailiff.

Bailiff, may I see the verdict?

BAILIFF HOLT: Yes, sir.

THE COURT: The verdict appears to be in proper form.

Madam Clerk, would you be kind enough to publish the verdict.

THE CLERK: We, the jury, find the Defendant guilty of capital murder, as charged in Indictment Number One.

Members of the jury, is this your verdict and so say you all?

THE JURY: Yes.

THE CLERK: We, the jury, find the Defendant guilty of use of a firearm in the commission of murder, as charged in Indictment Number Four.

Members of the jury, is this your verdict, and so say you all?

THE JURY: Yes.

THE COURT: Would you poll the jury, please, for me, please.

THE CLERK: Melvin Underwood, Senior, are these your verdicts?

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[25] Dennis Tuinei – Direct

[February 14, 1998]

Thank you.

THE COURT: Thank you, Mr. Saunders. Call your first witness.



MS. ADDISON: Thank you, your Honor. Commonwealth would call Dennis Tuinei.

THE CLERK: Dennis Tuinei, come into the Courtroom, please,

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DENNIS TUINEI,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning. Would you state your name for the record, please.

A Dennis Tuinei.

THE COURT: Spell it, please.

THE WITNESS: T-U-I-N-E-I.

MS. ADDISON: Thank you.

BY MS. ADDISON:

Q Mr. Tuinei, where do you live?

[26] A Hampton, Virginia.

Q Were you living in Hampton in April of 1996?

A Yes, ma'am.

Q Directing your attention to April 28th of 1996, approximately midnight on that date, do you recall where you were?

A Yes, I was outside of Almost-A-Banc on a pay phone.

Q Were you alone or with someone else?

A No, I was with one of my friends.

Q Excuse me?

A I was with one of my friends.

Q One of your friends? And did you at that time have an encounter with the Defendant in this matter, Daryl Atkins?

A Yes, after two more of my friends arrived.

Q Would you describe for the jury, please, that encounter and what happened.

A At midnight, I was on the pay phone. And when I got off, I turned around and there was three guys there. And we were instructed not to get inside of the car.

Q By who?

[27] A By an unidentified man. They had a gun, told us not to get in. And Mr. Atkins searched my pockets, my friends' pockets as we were on the ground. And he stood over me for a while and he kept asking me what I was looking at. And I guess after a minute or so he hit me in the back of the head with a bottle.

Q Were you injured as a result of that?

A No, I wasn't.

Q Did you have any financial or economic loss as a result?



A Yeah, I had to buy a new pager. And he might have got, like, five bucks off of me.

Q Did you ever receive any reimbursement?

A No, ma'am.

Q Were there any psychological effects or treatment as a result of that encounter?

A Yeah. Yeah, it was. It was –

MR. SAUNDERS: Your Honor, –

THE COURT: Yes, sir.

MR. SAUNDERS: – could we have a side bar on this, please? I hate to do this, but –

THE COURT: All right.

(The Court, counsel for both sides and the Court Reporter went [28] to the side bar.)

MR. SAUNDERS: We're treading on dreadfully dangerous ground. She's getting into trying to put a victim impact statement from another prior crime that is not the issue here. I know if he suffered physical injury and there is still lasting physical injury that may be relevant. But psychological effects, I would object to that being introduced.

THE COURT: The victim impact from another crime, Ms. Addison –

MS. ADDISON: I'll withdraw it. I think it is admissible, but I'll withdraw it.

THE COURT: Okay. Fine.

MR. SAUNDERS: Thank you.

THE COURT: Thank you, sir.

(The Court, counsel for both sides and the Court Reporter returned from side bar.)

MS. ADDISON: I have no further questions of this witness, your Honor.

THE COURT: All right. Do you wish to cross-examine?

MR. SAUNDERS: Briefly, your Honor.

CROSS-EXAMINATION

[29] BY MR. SAUNDERS:

Q Mr. Tuinei, –

A Yes, sir.

Q – you said they had a gun, correct?

A Yes, sir.

Q Daryl Atkins didn't have the gun, is that correct?

A That's correct.

Q All right. And did he actually take any money off of you?

A Yes, he did.

Q That was the five dollars?

A Uh-huh, and my pager.

MR. SAUNDERS: And your pager. All right.



I have no further questions, your Honor.

THE COURT: Thank you.

MS. ADDISON: One question.

REDIRECT EXAMINATION

BY MS. ADDISON:

Q Mr. Tuinei, where was the gun when [30] Mr. Atkins was taking your pager and the cash?

A At the back of my head.

MS. ADDISON: Thank you. No further questions.

MR. SAUNDERS: May I?

THE COURT: Certainly.

MR. SAUNDERS: Thank you, your Honor.

RECROSS-EXAMINATION

BY MR. SAUNDERS:

Q You testified – you recall testifying in Hampton Circuit Court on March 7th, 1997 –

A Uh-huh.

Q – in these particular proceedings?

(The witness nodded his head affirmatively.)

THE COURT: You need to answer, sir.

THE WITNESS: Yes.

BY MR. SAUNDERS:

Q Not in these proceedings but in a proceeding in which –

A I know what you're talking about.

Q The jury doesn't, so I want to make it clear. You testified on March 7th, 1997, Hampton Circuit [31] Court, in connection with your robbery, correct?

A Correct.

Q Now, in that testimony, did you – do you recall stating that the gun was at the back of your head when the money was taken from you?

A No, because I wasn't asked the question where the gun was at.

Q But Mr. Atkins didn't have a gun. You know that for a fact, don't you?

A Yeah, he had a bottle instead.

MR. SAUNDERS: Okay. Thank you.

THE COURT: All right. Any further need for the witness?

MS. ADDISON: No, sir, I don't believe so. Thank you.

THE COURT: All right. Mr. Tuinei, thank you, very much for coming. You're free to go or you may remain in the Courtroom.

Next witness.

MS. ADDISON: John Hultquist.



THE CLERK: John Hultquist, come into the Courtroom, please.

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[32] JOHN C. HULTQUIST,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning. Could you state your name, please.

A My name is John Hultquist. John C. Hultquist.

MS. ADDISON: Oh, have you not been sworn?

THE COURT: Have you been sworn?

THE WITNESS: Yesterday, sir.

THE COURT: All right. You were sworn here yesterday?

MS. ADDISON: He came late, your Honor.

THE COURT: Pardon me?

MS. ADDISON: He was not here in the group just a moment ago that was sworn in its entirety.

THE COURT: Well, just out of an abundance of caution, would you mind standing down out of the chair,

sir. I mean, we haven't done this before, but [33] let me get you sworn in again, please, sir.

THE WITNESS: Okay.

(The witness was duly sworn.)

THE COURT: Thank you. That's just out of an abundance of caution. Your swearing in yesterday would have been fine. You are under oath. Thank you, sir.

THE WITNESS: Yes, sir.

BY MS. ADDISON:

Q Now, Mr. Hultquist, if you would, spell your last name for the Court Reporter.

A H-U-L-T-Q-U-I-S-T.

Q And what city or county do you live in, Mr. Hultquist?

A Newport News.

Q Newport News. Were you living there in April of 1996?

A No, I lived in Hampton at that point.

Q In Hampton? Directing your attention to April 28, 1996, were you living in Hampton then?

A Yes, ma'am.

Q Do you recall where you were on that date at approximately midnight?

A Almost-A-Banc on Mercury Boulevard.

Q What were you doing there?



[34] A Using the pay phone. Actually, one of my friends was using the pay phone.

Q And who was that friend?

A Scott Thompson.

Q All right. Did you have an encounter with the Defendant in this matter, Daryl Atkins, at that time?

A Sure did.

Q Can you describe for the jury what happened?

A Okay. Well, four of us, Scott, Shane, myself and Dennis, we were standing around the pay phone, and three guys came up and proceeded to surround us. And Scott had asked, "Do you need to use the phone?" And one of them, I can't remember which, said, yeah, you know. He said, "Okay, hang on." Okay. And he finished up his conversation, hung up, and we all proceeded to get back in my car.

And one of them said, "Don't get in the car," you know, "and take your belongings out and get on the ground." So we did that. And I got out – I was – by that point, I was towards my door to get into my car, so I was on that side of the vehicle and my other friends were on the other side. So I was pretty much the only one on that side. Got down, and – and, you know, I [35] heard – I heard somebody on the other side talking, saying, you know, "What the fuck are you looking at," you know.

And then, I guess, by that point the other two guys had started back towards their vehicle or wherever it was they got away with, and I heard a bottle hit the ground.

So I kind of got up, and looked over, you know, and I saw Dennis get up, my friend Dennis.

Q Is that the gentleman that just testified?

A That's right, uh-huh. Like, you know, he was going to come after him – my friend was going to go after this guy. That's when I saw him running.

THE COURT: The witness gestured toward the Defendant.

THE WITNESS: Yes, sir, the witness.

And so I just assumed that he had been hit with that bottle, and which Dennis said later that he had.

BY MS. ADDISON:

Q Did you have any financial loss or property taken?

A I lost about twenty-two dollars.

MS. ADDISON: Thank you. Answer any questions Mr. Saunders has.

[36] THE COURT: Cross-examination.

MR. SAUNDERS: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. SAUNDERS:

Q Sir, what was your contact with the Defendant on that evening?

A My contact was that he was there when I was robbed.



Q He was there?

A That's right.

Q But your personal contact with him was what?

A Are you saying physically?

Q Yes, sir.

A He had done no physical injury to me.

Q So in response to the Commonwealth's question, that should have been your answer. You were asked what your contact was with him. And you go into this description of what happened to somebody else.

A Oh, I'm sorry, I'm a little bit dubious about what your question is, –

MR. SAUNDERS: I have no further questions.

[37] A – my contact.

THE COURT: All right. Any redirect?

MS. ADDISON: No further questions of this the witness, your Honor.

THE COURT: All right. Any further need for Mr. Hultquist?

MS. ADDISON: No, sir.

MR. SAUNDERS: No.

THE COURT: All right. Thank you. You're free to go. You may leave or you may have a seat in the Courtroom.

Next witness.

MS. ADDISON: Kevin Phillips.

THE CLERK: Kevin Phillips, come into the Courtroom, please.

THE COURT: Has he been sworn?

MR. ROGERS: Yes, he has, sir.

THE COURT: Okay. Have a seat up here, sir.

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KEVIN PHILLIPS,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

[38] DIRECT EXAMINATION

BY MS. ADDISON:

Q Would you state your name for the record, please.

A Kevin Phillips.

Q Mr. Phillips, where were you living in June of 1996?

A I was living in Hampton.

Q Hampton. Were you employed at that time?

A Yes.

Q How?



A I was a delivery driver for Chanello's Pizza.

Q Pizza delivery? Directing your attention to June 28 of 1996, were you so employed in Hampton at that time?

A Yes.

Q Were you working on that day?

A Yes.

Q Did you have an encounter on that day with the Defendant in this matter, Daryl Atkins?

A Yes.

[39] Q Would you describe for the jury your encounter with Mr. Atkins.

A I was just getting ready to get off work, and I went to – they asked me to take one more delivery. So I took a delivery to a house on Sacramento. I can't remember the address. And as I approached the house the – I was told not to deliver it if it looked suspicious.

So there was someone standing out front, so I pulled in front of the house and walked up to the house. When I got about twenty feet from the front door, the person at the front door turned his back to me. And at that time I started walking closer to him, and three other people came around the side of the house.

Q Was there anything unusual about their appearance?

A They were all wearing big, black coats, with hoods and, like, masks, or hooded masks.

Q The man standing at the door, was he dressed similarly?

A He had a striped shirt on, long shorts, and no mask.

Q No mask?

A No mask.

Q What happened next?

[40] A At that time, one – two of the people walked straight to the car, and one of them came around me with a gun. At that time he walked around behind me and put the gun up to my head. At that time the person that was standing without the mask came around behind me and started checking my pockets and seeing if I had – just emptying everything I had.

Cars started driving by, and they told me to get down. So they put me on my knees and kept the gun in the back of my head. At that time I was told to crawl to the – to around the bushes to get to my car. And I kept asking over and over again, to make sure I got everything right, so I didn't do something I wasn't supposed to.

At the time they put me in the back of my car. One of the people was already there. And he was in the driver's seat. The person with the gun got into the passenger-side front seat. And then the other two ran.

At that time I was driven about maybe half a mile to this place where there's a swamp. And I was told to get out of the car. And on the way there, there was like a debate on whether or not I was going to be shot or not.



And they were – one was trying to and one was trying not to.

[41] The – I got out of the car, and one of them walked behind me up through this field in between some houses. And at that time I was told to lay on the ground. And I got on the ground, and the gun was put in my back and I was searched again, I guess, to make sure everything was taken. He stood up and he just stood there for a couple of minutes, and then he told me to stand up and walk towards the edge of the swamp.

I got to the edge, and he put the gun – he racked the gun, or loaded it, and put it to the back of my head and stood there for a couple of minutes, and then he said I had five seconds to run. At that time I got into the swamp and I was going through, and once I got to the other side I was told if – if they saw a white hat that they would kill the person that was wearing it.

Q Did you have on a hat?

A I had on my delivery hat. It was a white hat. And at that time I dove under and just started crawling through the bottom of the swamp. And then I heard tires squealing. So at that time I got up and just kept going across.

Q What, if any, financial loss did you have as a result of this?

A I lost my car, hence I lost my job. I couldn't do my job anymore just because of the [42] consequences of it. Insurance, rent, everything, I pretty much lost everything.

MS. ADDISON: Answer any questions Mr. Saunders may have.

CROSS-EXAMINATION

BY MR. SAUNDERS:

Q Good morning, Mr. Phillips.

A Good morning.

Q Now, the incident you just described, how many people were involved?

A Five, including me.

Q All right. And you said that there was one unmasked individual, correct?

A Correct.

Q The other three individuals were fully masked?

A Yes.

Q Have you ever been able to pick out any of those four people?

A Just descriptions.

Q So you were not able to say who was unmasked at the door, correct?

A No.

[43] Q And the individual that you say – kept repeating as he, you're not talking specifically about the Defendant?

A Which he?



Q That's what I'm saying.

A In which instance of the –

Q You kept saying he had gone or he put me in the car.

A Okay.

Q But you're just stating –

A I'm stating he as an individual, not as a person.

Q Not the Defendant?

A Right.

Q All right. Do you recall testifying in Hampton Circuit Court on March 7th, 1997 –

A Yes.

Q – in connection with that incident?

A Yes.

Q Do you recall the description you gave of the individual who had the gun?

A Yes.

Q Would you repeat that description for us.

A The one who had the gun was six foot, [44] six-one, about a hundred and ninety pounds.

Q And do you recall the description of the individual who was unmasked at the front door?

A He was about five-five, five-six, about a hundred sixty-five, a hundred seventy pounds.

MR. SAUNDERS: May I approach for a moment?

THE COURT: Do you need to show him something?

MR. SAUNDERS: Yes, sir.

THE COURT: Give it to the Bailiff, have him point out what you wish him to read.

(A document was handed to the witness by the Bailiff.)

BY MR. SAUNDERS:

Q Could you look at line nineteen to twenty-one, sir.

A Okay.

Q Does that refresh your memory as to the weight of the individual that you were talking about?

A Okay. I was off about ten pounds.

Q More like twenty?

A Oh, twenty.

THE COURT: Would you hand that back to Defense Counsel.

[45] (The document was returned by the Bailiff.)

BY MR. SAUNDERS:

Q Would you tell us what it says as far as what the weight was?

A A hundred and forty to a hundred forty-five.



MR. SAUNDERS: All right. I don't have any further questions, sir.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. ADDISON:

Q To your personal knowledge, Mr. Phillips, was Daryl Atkins ever charged with offenses involved in that incident?

A Yes.

Q And you, in fact, testified at the trial?

A Yes.

Q Do you know whether or not he was convicted?

A I believe he was convicted.

MS. ADDISON: Thank you. No further [46] questions.

THE COURT: Recross?

RECROSS-EXAMINATION

BY MR. SAUNDERS:

Q If you were unable to identify anybody, do you have any idea how he was convicted?

A Could you –

Q If you were unable in that trial to say he was the individual who was there, do you have any idea how he got convicted?

A I'm not up on the legal aspects.

MR. SAUNDERS: Nothing further.

THE COURT: Okay. Any further need for Mr. Phillips?

MS. ADDISON: No, sir, I don't believe so.

THE COURT: Thank you for coming, sir. You're free to go or you may remain in the Courtroom.

MS. ADDISON: Commonwealth would call Amanda Hamlin.

THE CLERK: Amanda Hamlin, come into the Courtroom, please.

MS. ADDISON: Ms. Hamlin has been [47] sworn.

THE COURT: Yes, I recall her.

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AMANDA HAMLIN,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning, ma'am. Would you state your name, please.



A My name is Amanda Hamlin.

Q Would you spell your last name for the record.

A H-A-M-L-I-N.

Q Thank you. Ms. Hamlin, directing your attention to August 9th of 1996, where did you live on that date?

A 934 Aberdeen Road. And that's in Hampton, Virginia.

Q And approximately eight o'clock in the evening on this date, were you at your home?

[48] A Yes, ma'am.

Q What were you doing, if you recall?

A I was just finishing up cutting my grass.

Q Was there anyone else there with you?

A My daughter was in the house.

Q Did you at that time have an encounter with the Defendant in this matter, Daryl Atkins?

A Yes, ma'am.

Q Describe for the jury, please, what happened in that encounter.

A Okay. I had just finished cutting my grass. And I was backing my lawnmower into the shed. And my head was turned like this as I was backing in (demonstrating). And just as I was coming back around like this (demonstrating), a gun was slapped up beside my head. And there was some dialogue. I can't remember exactly what the dialogue was. But Daryl told me to get off my lawnmower.

Q Did you do that?

A Yes.

Q Did you have any problems doing that?

A My foot had gotten caught in the lawnmower, and he came around and helped me to get my foot out of my lawnmower, yes.

[49] Q What happened next?

A He asked me who was in the house. And I don't remember what I replied. And from that point on, he caught onto my shirt and led me around to the front yard and –

Q Where was the gun at that point, if you know?

A I don't remember. I don't remember. He led me around to the front yard, and we were standing in front of my den window, and he took the gun and he hit me in the head. And I fell to the ground.

Q Were you struggling with him when he did that?

A No, no.

Q And what happened next?

A He picked – he helped me to get up from the ground. And there was some dialogue there, I don't remember what that was either.

And after that he started up the side of my driveway, like he was going to leave. And I started to walking toward my house, but I stopped, because I thought if I ran then he'd shoot me in the back. So he went up beside of the car and around like he was leaving, and then he



came back down towards me. And I was just standing there, just looking at him. And he took the gun [50] and put it to my stomach and just shot me.

Q Were you hospitalized as a result of that gunshot, Ms. Hamlin?

A Yes, ma'am.

Q For how long?

A Twenty-one days.

Q Did you have any other medical treatment as a result?

A Yes, ma'am, I'm seeing a psychiatrist.

Q Did you have any surgery or any other medical procedure?

A After August, I had to go back to the hospital to have – I received a colostomy as a result of the gunshot, and I went back in March of 1997 to have the colostomy removed, and that's it.

Q Do you still have any physical problems as a result of the gunshot?

A No.

Q Did you have any economic loss as a result of this?

A No.

Q Medical bills covered by insurance?

A Not – not all. The victim program helped me for a while, but right now I pay my own psychiatric bills.

[51] MS. ADDISON: Thank you. Answer any questions Mr. Saunders may have.

MR. SAUNDERS: I have no questions.

THE COURT: All right. Ms. Hamlin, thank you so very much for coming. You're free to go or you may remain in the Courtroom.

THE WITNESS: Thank you.

THE COURT: Next witness.

MS. ADDISON: Mark Armitage.

THE CLERK: Mark Armitage, come into the Courtroom, please.

THE COURT: He has been sworn?

MS. ADDISON: He has been sworn, your Honor. I believe he previously testified earlier this week.

THE COURT: All right.

MS. ADDISON: I would remind you, Mr. Armitage, you are still under oath.

THE WITNESS: Yes, ma'am.

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MARK ARMITAGE,

recalled as a witness by the Commonwealth, having been previously sworn and testified, was further examined and [52] testified as follows:



DIRECT EXAMINATION

BY MS. ADDISON:

Q You stated earlier when you testified in this trial that you knew the victim, Eric Michael Nesbitt?

A Yes.

Q When did you meet Eric?

A He got to Langley in about January of –

THE COURT: Excuse me. May we have your name?

MS. ADDISON: Oh, I'm sorry.

THE WITNESS: Mark Armitage.

THE COURT: Thank you.

BY MS. ADDISON:

Q When did you first meet Eric Nesbitt?

A He got to Langley Air Force Base in about January of '94, I think it was.

Q And what, if any, relationship did you develop with him?

A He became one of my closest friends. We frequently did almost everything together.

[53] Q How often would you see him?

A Every single day, sometimes twice a day, because we worked together and hung around after work.

Q Are you married, Mr. Armitage?

A Yes, ma'am.

Q And was your wife a friend of Eric's as well?

A Probably his closest.

Q. When was the last time you saw Eric alive?

A That day, the day. August 16th, 1996.

Q Where was that?

A At a – saw him at work, and then we had a squadron picnic that day, and we all were there playing games and just squadron camaraderie, everyone hanging around together having a good time.

Q And how is it that you found out that Eric had been killed?

A Detective Lyons and another officer – two other officers came to my apartment the next morning, Saturday morning.

Q What, if any, effect did Eric's murder have on you and your family?

A It hurt really bad. My wife was nine [54] months pregnant and I had to tell her he was dead. I didn't know how he was killed, just they told me he was dead. And they put me out in the hallway. I had to come back in and tell her. He didn't deserve it.

Q What, if any, effect did Eric's murder have on your wife, Mr. Armitage?



A She didn't stop crying for four days. And I had to hold her. She gave birth four days later. Eric was supposed to be my son's godfather.

MS. ADDISON: Thank you, Mr. Armitage. Answer any questions Mr. Saunders may have.

THE COURT: You may cross-examine.

MR. SAUNDERS: I have no questions.

THE COURT: All right. Thank you, Mr. Armitage. You are free to go or you may remain in the Courtroom.

THE WITNESS: Thank you.

THE COURT: Next witness, please.

MS. ADDISON: Mary Sloan.

THE CLERK: Mary Sloan, come into the Courtroom, please.

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MARY SLOAN,

[55] recalled as a witness by the Commonwealth, having been previously sworn and testified, was further examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Would you state your name, please.

A Mary Sloan.

Q Mrs. Sloan, you have previously been sworn and testified in this matter, is that correct?

A Yes.

Q And you testified before that you are the mother of Eric Nesbitt?

A Yes.

Q What was Eric's date of birth?

A February 10th, 1975.

Q Do you have other children, Ms. Sloan?

A Yes, I have five other children.

Q What are their names and ages?

A Marshall is nineteen. Julie is seventeen. Brenda is twelve. Tim is eight. And Nathan is six.

Q So Eric was the oldest?

A Yes.

[56] MS. ADDISON: I'd ask that that be marked. I don't believe it has been, your Honor.

THE COURT: Commonwealth's Exhibit 70.

(Commonwealth's Exhibit Number 70
was marked for identification.)

MS. ADDISON: I'm going to ask the Bailiff, Ms. Sloan, to hand you a photograph as soon as it's marked.

(A photograph was handed to the
witness by the Bailiff.)



BY MS. ADDISON:

Q Do you recognize that photograph?

A That's myself and my children at a family reunion a couple of years ago. It's Eric, Julie, Marshall, Brenda, and Tim.

Q Which one is Eric in that photograph?

A He's the tall, red-headed one. Apparently he made us all laugh, saying something there.

Q You described when you testified before about some of the things that Eric did in high school and as he was growing up. Do you recall that?

A Yes.

Q What were some of his interests and activities?

A He liked sports. And he played on [57] basketball and ran track at his school. He was in the Boy Scouts for a number of years, long enough to became an Eagle Scout. He liked camping, hiking, fishing. He was in a Christian youth organization in town. And –

Q For the benefit of the jurors that may not know, Ms. Sloan, describe what was involved in becoming an Eagle Scout?

A It's the highest rank that a boy can reach in scouting. And it takes a lot. As you go through scouting, at each level you have to do a service project and do all kinds of I guess you call them achievements, and starting right out from the Cub Scouts. And the boys in Boy Scouting have to take a lot of responsibility. They lead the

pack and they take leadership positions, and something that Eric took right to.

And to became a Eagle Scout you have to get twenty-one – twenty merit badges, which involved quite a lot of work, doing a lot – a number of different activities, and have to do a service project which involves something that you do for the community or an organization.

Q I'm going to hand you another photograph, Mrs. Sloan and ask if you –

THE COURT: Marked Commonwealth's Exhibit Number 71.

[58] (Commonwealth's Exhibit Number 71 was marked for identification.)

BY MS. ADDISON:

Q Seventy-one. Do you recognize that photograph?

A Yes, that's Eric when he receive his Eagle Scout award at our church in I believe it was June of '93. They say only two percent of boys that go into scouting achieve the Eagle Scout Award. So it's difficult to do.

Q What were the community activities that Eric did that earned him the Eagle Scout rank?

A I think the one – the final project he did, he had to organize and do the – have the troop paint the inside of the Masonic Lodge where the Scouts were holding their meetings. It involved making sure the materials were obtained and organizing it, making sure that everyone came to work and cleaned up afterwards. And there was a lot involved.



Q Did he have any involvement with the fire department and rescue squad?

A Yes, he became an Explorer Scout, which was affiliated with the rescue squad in Gilbertsville, and he became an emergency first responder, took the training for that. And then when he became [59] eighteen, he was eligible to join the volunteer fire department, so he joined that so he could go on all the rescue calls.

Q I'm going to hand you one last photograph that would be Commonwealth's Exhibit 72?

THE COURT: Seventy-two.

(Commonwealth's Exhibit Number 72 was marked for identification.)

BY MS. ADDISON:

Q Ask if you recognize that photograph?

A This is Eric with his Explorer Troop in front of the Gilbertsville ambulance. Eric was instrumental in forming that Explorer Troop. They never had one before in Gilbertsville. He kind of pulled everybody together and did it because it was something he felt was necessary for the community.

Q When did he join the Air Force, Ms. Sloan?

A In August of '93, two months after he graduated from high school.

Q Prior to that, had he been employed ever?

A Yes, for about two-and-a-half to three years in high school, he worked at our neighbor's dairy farm, helping with chores for a few hours each week. And [60]

in the time after he graduated from high school and when he was waiting to go into the Air Force, he worked doing hay for a local farmer who did hay.

Q After he went in the Air Force about how often did you get to see Eric?

A He was able to come up about four times a year, I guess.

Q And when was the last time that you saw him?

A Two weeks before he died he came up for a family reunion.

Q Did you, during that visit or others, have an opportunity to talk with Eric about his future plans?

A Yes, he was getting to the point in the Air Force where it was kind of decided if he was going to stay with it or what, and he kind of hinted that he would like to stay with the Air Force, he liked it, seemed like a good thing for him to do.

Q How was it that you were notified of Eric's murder?

A When someone dies in the military, they send out something called a Death Notification Committee. A couple of members of the military come right to your house and tell you.

[61] Q Is that how you were notified?

A Yes.

Q I know it's very difficult to do, but, if you can, describe for the jury the effect of Eric's murder on you and your family.



A It's just total shock. It's not something you would ever expect. You just can't believe that something so terrible would happen to someone that you know and love. And it's been just terrible.

Q What about Eric's brothers and sisters, what kind of impact has it had on them?

A It's kind of hard for me to describe, because they are children, and children really don't have any basis for dealing with something like this. It's not something they expect in their lives.

I think probably the hardest effect has been on Julie, my 17-year-old daughter, because she was quite close to Eric, and she is a little bit older and she understands some of it. And it's hard for them to even talk about it, because it's not – you don't know how to deal with it. I know she has lost a lot of weight since he died. And she has became kind of, I guess, fatalistic, you could say. She doesn't really – I don't think she thinks life can really have good things in it like it could have had because you just never know [62] what's going to happen.

And Brenda has taken it really hard because their birthdays were a day apart, and Eric was always kind of the special big brother for her. He always made an effort to send her a birthday card or a special present or something. And they were always kind of kidding back and forth and everything. And she has became quite defensive about things that have to do with Eric now, looking after him like maybe he's going to come back or something. I don't know.

Q And have your children, your remaining children, been here with you this week?

A Yes.

Q All of them?

A Uh-huh. It's been hard for them, I know. But it's their big brother and something they wanted to do.

Q Your oldest remaining son, was he able to be here this week?

A No, he's – he's in the Army and he just graduated from basic training Thursday, so he couldn't be here.

Q Where is he stationed?

A Pardon?

Q Where is he stationed?

[63] A In Fort Benning, Georgia.

MS. ADDISON: Thank you, Ms. Sloan. Answer any questions that Mr. Saunders may have.

THE COURT: Mr. Saunders, do you wish to examine this witness?

MR. SAUNDERS: I have no questions, other than to express my personal sympathy to the family.

THE WITNESS: Thank you.

THE COURT: Thank you, Ms. Sloan. You may have a seat in the Courtroom.

Next witness.



MS. ADDISON: Your Honor, the Commonwealth would move to introduce certified copies of prior convictions.

THE COURT: Do you want those photographs entered?

MS. ADDISON: Yes, sir, I would move to introduce the photographs at this time, please.

THE COURT: Any objection to the photographs coming in?

MR. SAUNDERS: No objection.

THE COURT: All right. We'll mark, then, previously marked Commonwealth's Exhibits 70, 71 and 72, make them filed and a part of the evidence in this case.

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[Admission Of Exhibits]

[64] And your next motion, ma'am?

(Commonwealth's Exhibits Number 70, 71 and 72 were received in evidence.)

MS. ADDISON: Move to introduce the certified copies of prior convictions. Your Honor, the documents are individual but there's no reason they can't be one exhibit.

THE COURT: That's fine. Any objection to having them a singular exhibit, Mr. Saunders?

MR. SAUNDERS: No, sir.

THE COURT: All right. Make that 73. You've seen them, Mr. Saunders.

MR. SAUNDERS: Yes, sir, I have reviewed these. I have no objection to these.

THE COURT: All right. Mark those as Commonwealth's Exhibit Number 73, the prior convictions, and mark them filed, make them part of the evidence in this case.

MS. ADDISON: Thank you, your Honor.

(Commonwealth's Exhibit Number 73 was received in evidence.)

MS. ADDISON: No more witnesses, your Honor.

THE COURT: All right. Commonwealth

* * *

[Argument To Judge]

[70] background of the Defendant and other facts in mitigation of the offense. Then it goes on to define those six matters which may be considered in mitigation.

Subsection C of the same Code Section: The penalty of death shall not be imposed unless Commonwealth shall prove beyond a reasonable doubt that there is a probability, based upon evidence, of the prior history of the Defendant, or of the circumstances surrounding the commission of the offense of which he is accused, that he would commit criminal acts of violence that would constitute a continuing serious threat to society. That is – has been proved. There is evidence to that extent, the continuing future dangerousness. That's how it's characterized, called future dangerousness.



MR. SAUNDERS: Yes, sir.

THE COURT: Comma, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. The Court reads that section as requiring some evidence as to the second factor.

Yes, sir.

MR. HAHN: Judge, if that's the Court's ruling, the Commonwealth would respectfully move [71] the Court to open – to allow the Commonwealth to reopen the case. I have case law that says that is clearly in the Court's discretion in the interests of justice.

THE COURT: You don't have to go into that. The Court is well aware of the Court's discretion relative to reopening. That's not an issue. The Court has that power and within the sound discretion of the Court, finding that there is no prejudice at this stage to the Defendant, that there would be prejudice to the Commonwealth if it were not allowed to reopen, the Court will permit the Commonwealth to reopen the case relative to the outrageously or wantonly vile, horrible or inhuman treatment, which involves the commission of the offense.

Now, which witness would you be calling to do that?

MR. HAHN: Your Honor, we move to introduce all the evidence previously admitted and the capital jury finding, which was rendered by the jury and is an official judicial record of the Commonwealth of Virginia and a

record of this Court and can come into evidence based on its own authenticity.

THE COURT: Mr. Saunders.

MR. SAUNDERS: I object, your Honor.

THE COURT: You are objecting to what, now?

[72] MR. SAUNDERS: The objection is to, number one, there is no foundation in this proceeding for the introduction of all of the exhibits from the prior proceeding.

There is – the autopsy report is hearsay. Doctor Bush would have to testify. She's not here to testify. The pictures from the autopsy have not been authenticated in this proceeding and, therefore, I object to the opening of the introduction of all of these things without a proper foundation, and also based on the medical examiners not being here to testify. There is no witness to authenticate any of this.

THE COURT: Do you have any objection to the Court's discretion in reopening?

MR. SAUNDERS: Well, I will note my exception to the Court's reopening. The Commonwealth had fully rested and they had represented to this Court that that was their case. And I recognize the Court's discretion, but note our exception.

THE COURT: All right. Now, based on your argument that there is no foundation, the Court finds that the records before the Court, the exhibits before the Court are before the Court with absolutely proper foundation. They are a record on the evidence of this proceeding, and



I would find that a foundation has been [73] previously provided. They are now the official records of this proceeding.

MR. SAUNDERS: You will note our exception to that ruling, Judge.

THE COURT: Did you wish to add to the rationale of the Court, Mr. Hahn?

MR. HAHN: If I might just have a moment, Judge. Obviously, from everything we can learn, there is no foundation – or this is first impression, so if you will just give me a moment to reflect.

THE COURT: Surely.

(The attorneys for the Commonwealth conferred.)

MR. HAHN: Your Honor, we believe the record in the sentencing or in the guilt phase is sufficient to rest upon, and we would ask that it all be introduced into evidence as well as the finding of guilt by the jury of capital murder.

THE COURT: Well, I don't know that that part is necessary. That's been done. That doesn't have to be done here. The finding of guilt is not at issue here. That's not the issue. The issue is outrageously wanton, vile or inhuman treatment.

MR. HAHN: Then we would move for the introduction of all the exhibits and the evidence [74] presented in testimony.

THE COURT: Now, you think about – you have – I want the Commonwealth again to think about what you're asking the Court to do. Because you have – there

are two triggering devices for the death penalty. Two triggering devices, future dangerousness, which you have put on evidence to that. All right. That's number one. And the outrageously wanton or vile conduct is number two. The jury does not have to find on both. All right? They do not have to find on both.

MR. HAHN: They can find either or, or both.

THE COURT: That is correct. Now, to again, asking you to consider this for your – for your review factor, the Court is comfortable with the position that the evidence that the Court has received has been received with proper foundation. It becomes a part of this proceeding. The exhibits – excuse me, the exhibits that are received have been presented with the proper foundation and do not have to be re – foundation does not have to be testified to again in this proceeding. I'm pretty comfortable with that. But I don't know if there is a case on this.

MR. HAHN: If Mr. Saunders would enlighten us, perhaps we could all know if there is a case [75] on this point.

MS. ADDISON: Your Honor, I have never seen anything that requires reintroduction of evidence from the guilt phase-regarding vileness. And we're not talking about just the exhibits but all evidence from the guilt phase, the jury necessarily has access to that.

As I said earlier, there's a case, Watkins, that talks about whether or not there is a need for a new, separate jury, and in discussing that issue, one of the statements is that that new jury would necessarily obviously have



access to all of the evidence from the guilt phase of the trial.

This is no – there is nothing additionally different about this than any other bifurcated trial. The evidence from the guilt phase need not be reintroduced or we would be here another week.

MR. ROGERS: It is difficult.

THE COURT: I'm not having any difficulty with that position. I'm going to ask you to narrow your focus and your thought process to the single thing of the outrageousness of the conduct itself, limited to, in the Court's vision of the matter, a few seconds or minutes of this transaction, which is during the time of the actual killing, okay?

Now, you have apparently two [76] witnesses, Doctor Bush, who has testified to the conditions of the body, and whoever observed that body with the casings and all that around. That would be Investigator Lyons or whomever was the lead person.

I would not permit Investigator Lyons to testify today because he's been in the Courtroom subsequent to his separation. When you rested, he has been in the Courtroom. I don't know whether he is in the Courtroom now or not, but I have seen him in the Courtroom.

MR. ROGERS: He is, for matters of the record, your Honor.

THE COURT: All right. Now, so he would not be permitted to testify. But the Court's view of this is that the outrageousness of it is what happened at the actual crime of capital murder. We've got the robbery. We've got

the abduction. That's admitted. The triggering one – two triggering devices for capital.

Now we're talking about what the aggravated battery of the victim and the aggravated battery is simply the condition of the body. Is that a fair statement?

MS. ADDISON: Yes, sir, it's shown by the autopsy –

THE COURT: Right.

[77] MS. ADDISON: – the photographs of the bullet wounds to the victim, the testimony regarding how that occurred.

THE COURT: I understand. I understand, okay? And that does not mean that you have to go back through and prove the entirety of the case.

MS. ADDISON: Is it the Court's position that that testimony needs to be reheard in this case?

THE COURT: I did not say that to you, ma'am. I said that I want you – your argument to the Court is that you'd have to try it for a week, you see. The – and I'm saying to you that you do not have to try it for a week. One witness who could identify the condition of the body in two or three minutes would be the person that would be able to show the aggravated battery to the victim.

MS. ADDISON: Your Honor, additionally I believe that we would need another witness to testify regarding what we view is a form of torture in the length of time of this entire offense.

THE COURT: And that would be Jones.



MS. ADDISON: That would be Mr. Jones. Or reintroduce the evidence from the guilt phase that's already part of the Court's record.

[78] THE COURT: You've got one of the triggering devices for death, okay? I mean, you've introduced evidence as to future dangerousness. I'm merely – and again, Mr. Hahn, –

MR. HAHN: I understand, your Honor.

THE COURT: – merely asking you to consider your position on review. I have ruled that I'm going to reopen. In the sound discretion of the Court, I'm going to let you reopen, if you wish. I have ruled that if you want to reopen that I would find that proper foundation has been laid for the introduction of the exhibits in the trial of this matter and they are part of the record of this Court, therefore – and the jury obviously has already seen them and considered them – therefore, I would allow you to argue the vileness factor based upon those exhibits.

MR. HAHN: Yes, sir.

THE COURT: The question I'm asking the Commonwealth at this point is: Do you want to do that?

MR. HAHN: Well, what I would ask, as an additional motion, since the Court seems – and I understand fully the Court's position. In an overabundance of caution and to some degree the Commonwealth feels that it may be tilting at windmills [79] here, just as an overabundance of caution, given the seriousness of this case, your Honor, I'd ask for a continuance for an hour-and-a-half so we can get these witnesses here today.

THE COURT: Denied.

MR. HAHN: We would move, your Honor, to introduce the autopsy of Doctor Leah Bush.

THE COURT: Already been admitted.

MR. HAHN: Then I understand the Court's ruling is all of those – all of the evidence in the guilt phase is admitted or will be admitted?

THE COURT: Yes.

MR. HAHN: And, your Honor, since you don't – the Court is not inclined to give an hour-and-a-half recess, I would ask the Court to give such time as would allow William Jones be transported from the Regional Jail here. That should be only a matter of twenty minutes or so. Certainly the seriousness of the case and the issue at hand would merit that, your Honor.

THE COURT: Think about what William Jones said, as to what that evidence is. Think about it.

MR. HAHN: Let me try one more time, Judge, maybe the third will be –

THE COURT: I haven't denied that motion yet, you understand.

[80] MR. HAHN: I understand, I understand. As we talked about the lyrics, as the trial is flowing, I'm trying to meet the changing circumstances. Would the Court allow the Commonwealth a brief, ten-minute recess to collect our thoughts on this matter, come back and tell you exactly what we would like to do, now that we have the Court's ruling on the Defense objection?

THE COURT: I'll grant that.



MR. HAHN: Thank you, your Honor.

THE COURT: Court will be in recess for ten minutes.

(The Court recessed, after which the Court reconvened.)

(The Defendant was present with his counsel following the recess.)

THE COURT: Mrs. [sic] Addison.

MS. ADDISON: Your Honor, I guess at this point I would ask the Court to clarify where its ruling is at this point. I understand the Court has granted our motion to reopen.

THE COURT: That's correct.

MS. ADDISON: The Court has said that the exhibits from the guilt phase of this proceeding were admitted with proper foundation and are admitted in this [81] proceeding, is that correct?

THE COURT: If you wish to pursue that on the – on the triggering device of vileness and outrageous conduct.

MS. ADDISON: That's correct. What I'm asking the Court for clarification purposes is, is it the Court's ruling that testimony – evidence through testimony from the guilt phase of the trial regarding those exhibits can be argued by counsel in this proceeding, or is the Court going to instruct the jury that they are to disregard that testimony in this proceeding?

THE COURT: Do you wish to be heard on that? She's asking for a clarification.

MR. SAUNDERS: Of the Court's position?

THE COURT: Yes. Do you wish to be heard?

MR. SAUNDERS: I'll wait until I hear what the Court's position is on it. Thank you.

THE COURT: Okay, sir. The argument for imposition of the death penalty, at this stage, there is evidence before the jury on future dangerousness. If you decide that you wish to proceed on the secondary, or the second issue that could trigger the death penalty, [82] which is outrageous conduct, the vileness, the exhibits which you have previously introduced can be argued.

MS. ADDISON: Can be?

THE COURT: Argued before the jury.

MS. ADDISON: The exhibits?

THE COURT: Yes. That's what I'm suggesting that you do, is limit your argument to the exhibits that have been introduced. The testimony which has been introduced was not reintroduced at this proceeding, the testimony, the verbal words.

MS. ADDISON: Yes, sir.

THE COURT: Okay. So in that – in that finite definition, I think if you have an exhibit you wish to produce that shows the second factor of vileness –

MS. ADDISON: Yes, sir.

THE COURT: – and I think there are at least two –

MS. ADDISON: Yes, sir, or more.



THE COURT: – or more, the photographs, there are charts, there are autopsy reports, et cetera, –

MS. ADDISON: Yes, sir.

THE COURT: – those exhibits have been, with proper foundation, previously admitted and are [83] a part of this record.

MS. ADDISON: And are admitted for this phase.

THE COURT: And would allow you to admit those in this proceeding because proper foundation has been previously presented and that would be a redundancy unnecessary at this proceeding.

MS. ADDISON: Yes, sir.

THE COURT: Does that clarify you?

MS. ADDISON: Yes, sir. And we would ask that those exhibits be admitted.

THE COURT: I have given you the chance to think about whether you wish to argue both of the triggering elements or just one.

MS. ADDISON: Your Honor, we wish to argue both.

THE COURT: All right.

MR. HAHN: Let me – the Court's comment on that raises an issue that we haven't gotten to the jury finding form yet. I have attempted to present it to Mr. Saunders and he doesn't like ours, so we'll have to come to that at some point. Maybe this is a good time to take

that up. It's our – the Commonwealth's understanding is we can argue that the jury can find future dangerousness and vileness, to use shorthand, or we [84] can say you can find he's not future dangerous but he's vile and deserves the death penalty, or you can find that he's future dangerous but not vile and still give him the death penalty.

THE COURT: The latter example is where you currently are. The singular triggering device for death penalty for future dangerousness, which you have presented evidence on –

MR. HAHN: Agreed.

THE COURT: – and if you stay there and choose not to reopen, notwithstanding the Court's permitting you to do that, –

MR. HAHN: I understand.

THE COURT: – then we would – the finding form would be reduced strictly to the future dangerousness or death or life and not including the vileness factor.

MR. SAUNDERS: Correct, your Honor.

THE COURT: And that's simply – I mean, simply put.

MR. HAHN: Okay. But what I want to clarify is if we do reopen, the Commonwealth reopens, all the exhibits from the guilt phase are introduced into evidence and accepted.

THE COURT: Yes, with proper [85] foundation at the guilt phase.



MR. HAHN: Then we'll have a capital murder finding that will be – there will be four sections to it. One, that –

MR. SAUNDERS: Your Honor, I think we're arguing the finding form at this point in time, which is not an issue at this point in time. I do have a major objection to take up at the appropriate time.

MR. HAHN: Well, why not take it up now?

THE COURT: He's just asking about – not the wording of the finding form but the – what would be in it.

MR. SAUNDERS: Actually, I think he is asking about the wording, because that's the impression I got, Judge.

MR. HAHN: Well, if we have to address that issue, why not do it now? I mean, we have exchanged with counsel and counsel doesn't seem to like it, so let's decide it right now, Judge.

THE COURT: I won't be able to decide until I hear all the evidence, number one, okay?

MR. HAHN: As to whether the form is right?

THE COURT: That's correct. The – in [86] general, without addressing the specifics of the finding form, the Commonwealth currently stands with the conviction of capital murder and evidence at the sentencing phase of future dangerousness.

MR. HAHN: Yes, sir.

THE COURT: If you stay here, if you do not go any further, that's where we are. We've got future dangerousness for the death penalty or life.

MR. HAHN: Yes, sir. I understand.

THE COURT: If you choose to reopen, and I've given you permission to reopen in the sound discretion of this Court, and when you reopen, you introduce – you reintroduce or ask that – you move that those exhibits previously filed be lodged in the vile stage of the triggering device for the death penalty, which the Court has said it would do.

Then you're at future dangerousness and vileness, future dangerousness or vileness, vileness alone, vileness or future dangerousness. Just the reverse.

MR. HAHN: Okay.

THE COURT: That's the perception of where the Court sees you. And those factors can also be life. They don't necessarily trigger death.

MR. HAHN: Agreed. Thank you for that [87] clarification.

MR. SAUNDERS: That's a fair statement of what the situation – the law is, Judge.

THE COURT: Okay. Thank you.

MR. HAHN: And one final clarification, Judge. Is it the Court's position that none of the testimony from the guilt phase comes into this stage?



THE COURT: That was a question Ms. Addison asked me to clarify. And since there is no verbal testimony presented at this proceeding, the only evidence that you would have to argue for vileness would be, in fact, your exhibits, the photographs, the charts or whatever else it is that are in the sixty-nine exhibits that were presented on behalf of the "Defense," and we would – that's where you are.

MR. HAHN: If I might just have a moment, your Honor.

THE COURT: Yes, sir.

(The attorneys for the Commonwealth conferred.)

MR. HAHN: Your Honor, we'd ask that the Commonwealth be allowed to reopen its case in chief in this part of the proceeding and that all the exhibits previously marked and introduced into evidence in the [88] guilt phase be admitted into this proceeding and would ask that for the sake of this motion and the record, would ask that the Court also rule that the testimony from the previous case – or the previous guilt phase of this case be deemed a part of this particular proceeding in order that the Commonwealth and the Defense can comment upon it to the jury.

THE COURT: You've gotten a favorable ruling on two parts.

MR. HAHN: I thought I might not get it all.

THE COURT: And there is objection by the Defense on all three of your requests.

MR. HAHN: Yes, sir. I understand the exhibits will come in and be admitted.

THE COURT: That's correct. And I have not ruled on – I have told you in a clarification mode where the Court was with arguing the verbal testimony of the guilt phase.

MR. HAHN: Yes, sir.

THE COURT: Do you understand the rationale?

MR. HAHN: Yes, sir, I understand it. I'm just, as the Defense often has to do, you have to make a motion. And I fully understand the Court's decision.

[89] THE COURT: This is the most responsibility that any Circuit Court Judge has in the Commonwealth of Virginia, bar none, okay? Agreed?

MR. HAHN: I would agree wholeheartedly, your Honor.

THE COURT: It's also a responsibility that falls on the Commonwealth.

MR. HAHN: Yes, sir.

THE COURT: That's why the Court has been compassionate with the ongoing trial of both Defense and the Commonwealth. But when the Commonwealth asks for something, you are risking, on review, remand.

MR. HAHN: I understand. That's why the Court is only going to give us two of the three requests.

THE COURT: Well, I feel fairly comfortable with the evidentiary part relative to the exhibits on the



argument of Defense foundation purposes, I think that's redundant and unnecessary. So I have ruled that it may come in, the exhibits may come in. I don't think it's appropriate because there is no verbal testimony in this proceeding for which you to argue.

MR. HAHN: Yes, sir.

THE COURT: So I want you to understand the thought process that goes through this [90] decision making.

MR. HAHN: Yes, sir, your Honor.

THE COURT: So I'm going to deny that.

MR. HAHN: Yes, sir.

THE COURT: Are you ready? Okay. Bring the jury in.

And note the exception of the Defense to all the Court's rulings.

MR. SAUNDERS: Yes, sir.

MR. HAHN: Do we need to renumber all of the exhibits in this proceeding?

THE COURT: No, sir, procedurally you move to reopen, I'll grant your motion to reopen. You're going to move for the introduction of the exhibits, I'll grant that, and then you rest.

THE CLERK: Will the jury come into the Courtroom, please.

THE COURT: Mr. Saunders, planningwise, we're now at eleven o'clock, I'm going to go to one, if you need it or a little longer, before we break on afternoon.

MR. SAUNDERS: I understand, Judge.

(The jury returned to the Courtroom and resumed their seats in the jury box.)

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[93] Doctor Evan Stuart Nelson

Q And, Doctor Nelson, can you give us some information as to your education?

A I'm a Ph.D., in clinical psychology. I received my degree from the University of North Carolina at Chapel Hill. Did my internship at the Indiana University School of Medicine, and a postdoctoral residency specifically in forensic psychology here in Virginia at the Forensic Unit at Central State Hospital.

MS. ADDISON: Your Honor, I believe there is a stipulation regarding Doctor Nelson's expertise.

THE COURT: All right. Do you wish to inquire further, or may I go by the stipulation?

MR. SAUNDERS: You may go forward, your Honor.

THE COURT: By reason of a stipulation previously entered by this Court between the Commonwealth Attorney and the Defense Attorney, by and for the Commonwealth and the Defendant, they have agreed to stipulate the qualifications necessary to qualify Doctor Nelson as an expert in the field of clinical psychology. And that



means, again, ladies and gentlemen, that he may offer opinions relative to his field of expertise.

Thank you, sir.

MR. SAUNDERS: Thank you, your Honor.

* * *

[95] knowing that there could be many different sides to the same story.

Q All right, sir. And have you testified in other capital cases?

A Many times.

Q And have you testified strictly for the Defense?

A No.

Q Have you testified also for the Commonwealth?

A At this time, I think I've been appointed by the Court in forty-six different capital murder cases throughout Virginia and thirteen or fourteen of those were for the Commonwealth; that is, after a first opinion the Commonwealth may want to have a second opinion. I've also done first opinions for Defense experts as well.

Q All right. Now, did you conduct an examination of Daryl Atkins in this particular case?

A Yes, I evaluated the Defendant. That, of course, meant looking at other things besides what he had to tell me.

Q What other things did you look at?

A I was able to look at his school records, some of the Court records related to his prior [96] offenses. I was

able to talk to the family members. I was able to look at information related to the current offense, statements by the Defendant and the Co-Defendant, information from investigative reports. I was able to give him a psychological test that I felt was relevant, was able to talk with the deputies at the jail to find out about his functioning at the jail, as well.

Q You said you gave him psychological tests?

A Yes.

Q What tests did you give him?

A I gave Daryl something known as the WAIS-III, W-A-I-S dash Roman numeral three, it stands for Wechsler Adult Intelligence Scale. It's the standard IQ test for adults here in the United States.

Q And did you find that Daryl had – excuse me, did you find Daryl had any mental illness or defect?

A Yes, based on that test and other information, his full scale IQ score was 59. That means that he falls in the range of being mildly mentally retarded.

Q You prepared certain exhibits I think to help the jury go along?

A Sure. It may help to understand what

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[99] separate the two. Obviously, the more education you have the more you practice using your mind. Just like you build up muscles, you can build up your mind.

An IQ test is in this case about an hour-and-a-half procedure of various tests that the person is asked to do.



And we give this to a large number of people. And based on the average score, we say that is an average IQ. And we set that score equal to 100. And then through some mathematical tricks, we create a range of scores for people where higher scores represent increasing intellect and lower scores represent less intelligence. So, for example, an IQ below 70 overall is considered likely to be mentally retarded, whereas people who are above about a hundred and 30 or a hundred and 40 are approaching the range of brilliance.

These tests are very carefully developed because there are many decisions made about them with regard to placement services, disability monies, et cetera. And there need to be a lot of standards about how we give them so that two clinicians could give them and get essentially the same results, within a point or two. This particular test is the newest version of it. It was just redeveloped in 1995, was given to almost twenty-five hundred adults here in the United States.

The composition of people who take [100] this test is carefully made up to match the U. S. Census overall. It wouldn't make sense to say 100 is the average IQ if all we ever gave it to were white middle class Americans, or all you ever gave it to were inner city minority students. There's also an additional sample of African Americans within this particular test because of the recognition that there may be cultural issues that contribute to why some people from different races and class backgrounds may get different IQ scores.

This particular test measures a range from 45 to 155. There are other tests for other things, but that's why this

is the standard. It covers the vast majority of people who would need to take an IQ test. There are standard rules for administering each part of the test. These rules are laid out in a very thick manual that tells you precisely how to lay down the stimulus cards, the pictures that somebody might be dealing with, what order to put them in. The precise time limits for the amount of time that an individual has to solve a given problem and get an answer. These rules are called standardization. And that's exactly what I'm talking about, the need to be sure that when you give this test by different people that you'll come up with the same score, plus or minus a few points. That's known as the standard

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[105] THE COURT: Before you begin, again, this is entitled, this Defense 7, is entitled, Examples of IQ Test Items.

MR. SAUNDERS: Yes, sir.

THE COURT: Next chart – or next question.

BY MR. SAUNDERS:

Q Doctor, is it possible to fake the results of an IQ test?

A Yes and no. It's impossible to fake a higher IQ because this isn't a case where guessing can help you. Because after a certain number of failed items we start, and because as you can see you have to know answers. It gets pretty heck darn hard to fake a higher score. You might add a point or two more by guessing here and there.



Can people fake a lower score? Certainly. And there are a number of things that we look at to try and determine whether or not somebody has faked a lower score in an effort to look dumb.

Q As that answer applies to Daryl Atkins, how could you – could you tell whether he was faking or not?

A I could tell that he was not faking.

Q And how could you do that?

[106] A Well, there are a number of things. Again, this is a multi-part process. You don't rely on one piece of information.

First of all, you can't fake these performance questions. The bottom line is unless you know the test, you don't know at which point to start faking dumb, because you have no idea how many questions somebody else who is normal or dumb or mentally retarded or brilliant would actually get right or wrong. You may be able to take some guesses about the verbal questions, some easy questions like what are the colors of the American flag. You can pretty much guess that most people are going to get that.

So when people are faking, a couple of things happen. Number one is they have no idea when to start pretending that they don't know answers and, number two, because they don't know that, their scores on the 13 different subtests that make up this IQ are no longer even. Ideally, people's minds are evenly developed across their abilities to do different types of reasoning and logic and memory. So when you start to see someone's scores be scattered all over, you would have concerns.

And in the case of Daryl Atkins, there wasn't that type of scatter.

Q Is there anything in the information [107] that you attained in preparation for this test about Daryl Atkins' background that would lead you also not to think he had faked it?

A Oh, there is a great deal. If I could just follow up with one more thing on that, I think it might be clearer.

I'm putting up – this is marked as Defense Exhibit 12. It's entitled Daryl Atkins – IQ Data.

These are Daryl Atkins' scores on the verbal scales and the performance scales and they are charted out. The reason this goes from one to 19 over here on the left axis is that people can get scores on each one of these tests from one to 19. But what I was saying about malingerers – that is, people who are faking their scores – is that they don't know when to start saying, I don't know the answer to that. So what you get is extremely uneven patterns of scores because some of their scores come up closer to ten, which is an average score, and some of their scores are rock bottom at one, because they started to say, I don't know, much too soon.

You can see his scores are relatively even. And, in fact, there are statistical tests we apply to see if any of the scores are different from each other. And the only score that is different from anything else is his score on this particular single scale from this [108] particular scale (indicating), and I'm pointing to the difference between PA and DS. The details of the scales don't really matter, but that is not an overall pattern of scatter.



His full scale IQ is 59. Compared to the population at large, that means less than one percentile. So to distill that, one of the simplest things, if there is a hundred people here in the Courtroom, the odds are less than one person has an IQ of 59 or below.

Mental retardation is a relatively rare thing. It's about one percent of the population.

Q Doctor, on that chart that you've just got there, under your verbal scores you show a 64 and under the performance score you show a 60. How does that relate to the full scale IQ score?

A Well, the verbal scales are the tests that involve more academic types of things, and the performance scales are the ones that involve more mental reasoning, like the matrices. When this test is developed they first score those sets of items independently and that's what gives us these scores of 64 and 60.

The reason is that as the difference between the verbal IQ score and the performance IQ score grows, say, 15 or 20 points of difference, we can start to [109] look for things like learning disabilities or brain damage or certain types of tumors that can be affecting the way people are reasoning and thinking. So we have to have those.

But the full scale IQ score is not a simple mathematical average between 64 and 60. It's actually putting all of the items back in together, charting out a graph of the scores and then figuring out where people stand. And you can actually have IQ scores that are a few points higher or lower than the real average of these, simply

because people don't necessarily score evenly across various scores. Some people, who are not as bright, may actually score very well on one or two subtests and that skews the nature of information. It's not a perfect circle. There's lots of bumps and ridges.

Q In relation to – to explain that, you said you could indicate whether they had brain damage or anything along those lines. Did you find any evidence of that in this particular case?

A No, there's no evidence of brain damage here. Some portion of people who are mentally retarded likely have some mild brain damage. That explains why they have became retarded. But that's only one piece.

From his scores, there's no reason to [110] be concerned that brain damage is a primary issue for Daryl Atkins whatsoever.

Q Let's go back to the question I asked before you put that chart up. Is there anything in the information that you have reviewed that also led you to believe that Mr. Atkins was not faking this?

A Right. Clearly, if he has a 59 IQ, it should not come out of nowhere. There should be indications prior to this that he has been of limited intellect throughout his life. If that is not the case, then the wool has been pulled over my eyes, or there is something else going on to explain the low IQ.

I was able to review all of his academic records from the school system short of one year, where he was at a different school. And I was also able to look at a variety



of Court records that made reference to his limited intellect as well.

Q Did you prepare a chart on that?

A Yes, I did.

Q But prior to – Doctor, before you put that chart up, the information you're talking about now, his school records and all of that, in your report, did you share that with the Commonwealth Attorney?

A The report and the records are all given back to the Defense Attorney under this statute. [111] Once they decide that they would like me, if they want me to testify at this phase of the case, then all of that is handed over to the Commonwealth's Attorney. And I did have an opportunity to talk with Ms. Addison about what the opinions were in the report.

Q All right. Proceed with the chart.

THE COURT: Identify the number on that, sir – Doctor.

THE WITNESS: This is chart Number 8, Defense Exhibit Number 8, it's entitled Summary of School History. This is culled from going through Daryl's academic records, which are about an inch-and-a-half or two inches thick. Because he was in the same school system throughout his life, except for one year, we were able to get a complete set of records. This is essentially a summary of his grades and the comments on the report cards about whether he was to be passed on or not.

In first grade he got all satisfactory scores. But as early as second grade, when he's six or seven years old,

he's failing. And it says on the transcript, work of grade too difficult. So the limited intellectual functioning is evident from a very early age. They go ahead and put him back through second grade a second time. He got all satisfactory scores except he [112] needed improvement in reading. They put him in the third grade. He got three satisfactories, two B's and five C's. They put him in the fourth grade, where he got two satisfactories, three D's and four F's.

And the transcript says placed in fifth. In other words, this was a social promotion to keep him up. This wasn't because they believed that he necessarily passed fourth grade. And in fifth grade indeed, he doesn't do so well either, two satisfactories, six D's and two F's.

We don't have the sixth grade records. I think that he was in Newport News for a portion of that year.

In seventh grade he is back in Hampton. He gets one C, four D's and an F.

At this point he finally is referred for special education testing. But the form says that the screening committee decided not to do any screening. There's no details about why they chose not to do that, given his lengthy history of F's, having failed second grade, and having really been promoted out of fourth grade to keep up with his age group.

After this, he goes into eighth grade, where he gets all F's. And it says again on his transcripts, Daryl has not improved during this last [113] semester and, therefore, is still not meeting the requirements for promotion. What



they are making a reference to here is the literacy testing program, which I will explain in a moment.

Even though it says he didn't meet requirements for promotion, they put him in high school. In the ninth grade his GPA was a D-plus, and the first time he goes through tenth grade his GPA is a D-minus and the second time he goes through tenth grade his GPA is a D-minus.

Interestingly, at different points in his transcript, this is referred to as ninth grade, tenth grade and eleventh grade. There's one place that says he's in twelfth grade. What's happening is that Daryl is falling so far behind but he's at the age consistent with tenth, eleventh and twelfth grade, that it's no longer possible to easily categorize him.

What this data says to me, as well as some more that I'll show you, is that the limited intellect has been a part of Daryl his entire life. This isn't faked. This isn't manufactured because his life is in the balance. He is a slow learner and has been since as soon as we could start to take measures in second grade.

BY MR. SAUNDERS:

[114] Q You mentioned the literacy test.

A Yes.

Q Please identify the exhibit by number and name, please.

A This is Defense Exhibit Number 11. It's entitled Summary of Literacy Testing Program Scores. In Virginia, as in many states, we have a program where students need to pass a minimum test of reading, writing and

math. This is about minimal literacy. This is not about being a B or A student. They start getting it in the sixth grade. And the law says that you're supposed to have completed and passed all three portions before you can be promoted to high school.

In this case, when Daryl was given it the first time in sixth grade, he failed all three tests. In seventh grade, he passes reading by a matter of a few points. He failed writing and he didn't take math. After that, they only gave him one test at a time. In eighth grade he failed writing again. So he has passed reading and he's still failing writing.

And his eighth grade transcript has a letter attached to it, sent home to his parents, his mother, saying any eighth grade students in Hampton City Schools who have not passed all three tests by the end of the eighth grade will not have attained the status of a [115] ninth grader and, therefore, not be promoted to high school for the 1993-94 year.

However, they obviously did promote him and move him on to high school. And they continued to give him the test. They gave it to him again in ninth grade and he still failed. And then the second time he went through tenth grade, which is the last year that he was in school, they gave it to him again and he passed.

This is actually a time when Daryl had finally been put into some special education classes at a highly structured school, and for one semester his grades actually had some B's and C's in it and one A, if I recall correctly. And that particular classroom had a student-teacher ratio of eight students to one teacher. So it was the most



intense structured teaching environment that he had been in, and he was finally able to pass the math section, again by just a hair's breadth of a few points.

Q Can you give the jury some idea as to how this mental retardation of Daryl's affects him?

A Well, mental retardation is about limited intellectual ability. These are people who are slow to learn and, therefore, it starts to affect their social functioning. People who are slow to learn start to do poorly in school. On the whole, people who are [116] mentally retarded, especially teen-agers and young adults, start turning to peer relations as their primary way of feeling good and like they are mastering and doing something in their life because they are not going to make it in the academic sphere. Being mildly retarded does not mean that you're necessarily illiterate. There are some people who are mildly retarded who are illiterate and many who are not. It means that it's harder to reason, it's harder to learn any kind of new information or skill. It's harder to get a job. And, in fact, with Daryl's score he would automatically qualify for Social Security disability income for the evaluations that I do for Social Security Administration.

Q Is that kind of person a leader?

A I'm sorry?

Q Is that kind of person a leader?

A On the whole, people who are mentally retarded are not leaders. They tend to fall into groups because they can't make good decisions on their own. And when you look at their behavior patterns when they do things in

groups they look like they're doing better and when they do things on their own, they tend to do things in a fairly inept way.

Q Can psychologists predict whether someone will be violent in the future?

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[119] risk to be violent at some point in the future.

Q All right. So what is risk assessment and how is it different than relating to future dangerousness?

A Well, risk assessment talks about a range of possibilities from low risk to high risk, and it talks about the context of the environment, in this case, being in a prison and what that does to risk factors. So I'll talk to you about things like low risk factors and high risk factors or sometimes what are known as protective variables, things that people have that actually reduce their risk, but I can't tell you that somebody will or won't do something. All I can tell you is that in general when people try to predict, yes, someone will do something, we're wrong more often than we're right.

Q And what are some of the main risk factors you would consider in making an assessment?

A Probably the first one to consider would be age.

Q Do you have an exhibit that helps us with that?

A I do. This is Defense Exhibit Number 9. It's entitled Number of Arrests for Murder in U.S.A. during 1993. The 1995 data just came out, and there's



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[121] just less maturity. And that's why teen-agers are more likely to do this.

You can see that as somebody ages and this is whether they are in the community or whether they are incarcerated, the number of arrests for homicide goes down dramatically until you get to the point of about 40 and it starts to level off. And that tells us that age is a tremendously important risk factor and that overall the probability that somebody is going to be violent is going to go down just because they get older.

Q What about prior acts of violence, do they affect whether a person can be violent in prison?

A Well, yes and no. Prior acts of violence are very important, especially in the data we have about community release; that is, people who have been violent and have been released to the community do have a much higher risk of being violent again. And then you have to look at the pattern of their violence. Is it long term, over many years, or is it in a spree over a short period of time? What other factors went into it? Within the prison, however, all of the data we have suggests that the risks for violence are relatively small and that the prisons do an excellent job of containing violence.

Q Do you have an exhibit that helps us

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[126] Q Have you provided that to both Defense and the Commonwealth?

A It was provided to the Defense and then forwarded on to the Commonwealth, yes.

MR. SAUNDERS: We would ask that the report be admitted.

MR. HAHN: We have no objection, your Honor.

THE COURT: All right. Mark the report then, if you will – I don't think the Court has it.

THE WITNESS: Do you want to take my copy?

THE COURT: Mark that as Defense 13. Doctor, does the report contain small portions of what is on those charts, smaller versions of what is on those charts?

THE WITNESS: No, it doesn't, but the Court is welcome to ask Mr. Saunders for a set of those.

MR. SAUNDERS: I have them marked as the Court was marking them and provide them to the Commonwealth to review.

THE COURT: We can do either one. We can put the charts in, because there are ample charts involved, or we can put smaller versions of it in.

* * *

[128] A With regard to violence in the prisons?

Q Yes, sir.

A Well, we actually have, in Daryl's case, a sample of his behavior for just about eighteen months between the time of arrest and now in the jail system. And within the jail environment, he has not been in any trouble for any type of aggression or any significant institutional offense.



The issue is here that he is a mildly retarded individual who in the community has access to drugs and a lack of structure. And that explains a lot of how he gets involved in those violent behaviors. But within the structure of the jail and prison environment, his access to drugs is extremely poor.

The structure that a retarded person needs to keep them thinking straightly, knowing the rules, knowing what to do has been imposed and his behavior is very good. So there is a very high likelihood that he will be like most other Virginia inmates in that his likelihood of being violent within the prison is very small.

Q Are there any other characteristics about Daryl that might be relevant to risk?

A Well, substance abuse is a very [129] important risk factor. It's clear that people who are substance abusers have a very high risk for violence. Within the prison system there are people who manage to get access to alcohol and drugs. It's a comparatively small number of folks. So his likelihood of having that as a major risk factor is pretty small.

There are probably some other things about his background, for example, the fact that he was not with both parents through the age of sixteen, statistically, is a risk factor, but it's a risk factor again for people who are released to the community and is not relevant to being incarcerated.

Q You're talking about the risk assessment of Daryl while he's in jail, not while he's in public, right?

A Correct. Because prison is the environment, prison is where we need to wonder about what type of risk he can be.

MR. SAUNDERS: All right. Doctor, thank you. I have no further questions.

THE COURT: You may cross-examine. Sergeant, would you hand me those exhibits, please.

Cross-examination?

MR. HAHN: Yes, sir, your Honor. I

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[144] malingering, and you touched on that subject at some length. And what is exactly malingering again, so we can start off and go from there?

A Sure. Malingering is the conscious and volitional; that is, intentional effort to fake a set of symptoms in order to appear mentally ill or in some instances to fake not having any symptoms in order not to appear mentally ill.

Q And could you tell us the four items or criteria that if are present the reviewer should strongly suspect malingering?

A Well, I'm sure I would have to look at the book to tell you exactly what it says, but there are a number of scenarios. And malingering is actually an area that I have special expertise on and have lectured in four different places around the state, teaching other folks how to do that.



Number one, is there some reason for the person to have a potential gain by faking a mental illness? And in almost all Court situations, there is an obvious potential gain, whether it's a reduced sentence or avoiding the death penalty or winning money in a personal injury suit.

Number two, we're looking for other types of scenarios where the gain may have some benefit in

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[146] Daryl Atkins never claimed any symptoms, never made any effort to present himself or bring up, for example, the term mental retardation in any way, shape, or form. There's no reason to think that this was an active part of his plan, especially when looking at all the school records.

Q Well, did you come to any conclusion as to whether or not the antisocial personality disorder was in effect here?

A Antisocial personality disorder.

Q I'm sorry, I thought that's what I said.

A He clearly has – I think you said order. A personality disorder is a set of personality traits or behaviors that are extreme to the point that's maladaptive. A simple example that folks would have been more likely to have seen in their day-to-day life is somebody that has obsessive-compulsive personality disorder. If you will pardon the expression, this is what people colloquially refer to as being anal. These are folks who are so focused on details that they can't see the big picture, to the point that they are as irritating as can be.

In the case of antisocial personality disorder, which you can't diagnose until somebody turns

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[162] to the remedial school instead.

Q Okay. So the presentence report from Hampton that states that the Defendant was never in special education, quote, unquote, is correct?

A From a semantic sense, that is correct. He was never officially, legally qualified for special ed as compared to the remedial classes we have been discussing.

Q Now, I'd like to go to your opinion section of your report, Doctor. You are specifically charged by the statute to inquire into whether the Defendant acted under extreme mental or emotional disturbance at the time of the offense, is that correct?

A Correct.

Q That's what the statute requires you to talk about?

A That's right.

Q All this other stuff is just leading up to the main course?

A That's right.

Q Would you read – you have your report in front of you?

A I do.

Q Would you read your opinion on that section to the jury, please.



[163] A From the data available, it is the opinion of the undersigned that Daryl Atkins was voluntarily intoxicated on substances at the time of the offense.

Q Now, how did you make that determination?

A Based on the information available from his report to me, from his statements to police, from his Co-Defendant's statements as well.

Q Would your opinion on that change if you knew that the people who saw him immediately after this incident saw no signs of intoxication?

A Certainly not. They weren't in a position to necessarily see them or not see them. Intoxication isn't always an obvious thing. And in fact when he goes to the hospital after this, they didn't even test his blood.

He's reporting, he's admitting to a negative behavior about himself, and there is information coming in from the Co-Defendant about this behavior. I don't think there is any reason to think that he was not high at the time.

Q Well, there's no doubt there had been a lot of drinking and smoking dope early in the day, right?

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[167] BY MR. HAHN:

Q Now, the second part of that question Doctor, is whether or not the Defendant could appreciate the criminality of his conduct. It's true he understood his criminality very well, isn't it?

A Correct. As I said, my opinion is that there were no indications that Daryl could not appreciate the nature of his behaviors nor control himself.

Q Okay. And did you draw that conclusion from his attempts to conceal his guilt?

A No.

Q Okay.

A That's not how you draw the conclusions about whether somebody has a rational understanding of what's going on.

Q Okay. Well, let me ask you this: Since he was voluntarily intoxicated at the time, would that have had any impact on his goal-directed behavior?

A Absolutely. He's intoxicated on two types of chemicals, alcohol and cocaine. They have different effects. Alcohol, when people are high, reduce anxiety so people are more willing to do things that they would normally be anxious about and not do before. Crack cocaine makes people agitated and more likely to be [168] violent. In all research on crack, it increases aggression.

So those affect his judgment. The higher one gets on crack and the more intoxicated on alcohol, the less ability somebody has to exercise anxiety to stop yourself from doing something and the more likely they are to do something aggressive.

Q So Daryl Atkins was high on crack cocaine this night, and alcohol?

A That's my understanding.



Q Would it be fair to say that your expert opinion is that on August 17th, 1996 Daryl Atkins was able to understand the illegality of his actions and had the ability to behave appropriately had he chosen to do so?

A Right. I think that's what I said. That is my opinion.

Q And now we go to the third statutory inquiry, which is whether there are any other factors in mitigation relating to the history or character of the Defendant's mental condition at the time of the offense. And this – would you tell us your opinion on that issue?

A Well, there are a series of opinions that I believe you have already heard. Number one, that he is mildly mentally retarded and that contributes to [169] explaining why Daryl is involved in group offenses, why limited intellect would make him more susceptible to becoming involved with criminal behaviors and less likely to be employable and have reduced judgments and reduced understanding of the world in general around him compared to others.

Number two, that with regard to dangerousness issues within the context of a prison environment, that he has relevantly few risk factors, and his probability of dangerousness will go down over time because he's likely to get older.

Those are the two key issues.

Q Now, I want to ask you about it, before I forget about it, the – shooting Amanda Hamlin wasn't a group offense, was it?

A In fact, what's very interesting about that is his successful robberies are all ones where he has the help of other people. The time that he tries to do it by himself, he doesn't get to the robbery part. So that's another example of limited intellect and why it's hard for them to do things by themselves.

Q Well, let's talk about that now. Was it hard for him to turn around and pause and shoot Amanda Hamlin?

MR. SAUNDERS: Your Honor, the doctor

* * *

[171] robberies, and they are all in groups except for that one and that's the one where he does not get anything. So it's not in support or justification of the Defendant, it just may be an example of how limited intellect plays into problems even in a career as a criminal.

Q How many of those – how many other of those robberies, Doctor, was the victim shot?

A None.

Q Maybe the group behavior was an inhibiting factor.

A Yes, maybe he needed the supervision and that's why he does well in jail and in prison. As a retarded individual, he needs additional supervision to do better. When you leave him on his own, he does things that are just plain, old-fashioned dumb.

Q Well, is that because he needs supervision or because he needs drug treatment?



A That may be both, but he clearly needs supervision. He needs drug treatment, but that won't be germane to long-term incarceration in the prison.

Q Well, let me ask you if this statement in your report is correct. If the Defendant has successful substance abuse treatment and could be placed in a supervised home, then his risk of future dangerousness, if released to the community, might be

* * *

[176] were corroborated or not corroborated in the record and explaining the opinion.

I'm expressing two key opinions here. One is about mental retardation, which is substantiated by an IQ test and 13 years of academic records. And the other is at risk factors for aggression which is based on the research, the psychological research, and knowledge about Daryl Atkins' key features that are relevant to that.

Q I think there is a very important opinion that you left out that you are expressing here, Doctor, and I'll read it to you. You tell me where this fits in in the scheme of things.

From the data available to the undersigned, there were no indications that Daryl could not appreciate the nature of his behaviors and control himself.

That's a fairly important opinion, isn't it?

A Sure.

Q Just as important as whether or not he is mentally retarded?

A No, because again, there may be misunderstandings about this. There has never been a concern raised that this is a Defendant who is mentally

* * *

[182] whether it's driving under the influence or possession or a felon, and it's all the same in terms of those risk factors. We treat them differently because of the nature of the offense. But from the psychological perspective, drug abuse is drug abuse when it comes to aggression.

Q And what evidence in the record did you find of Daryl Atkins' substance abuse?

MR. SAUNDERS: Judge, first, I think that was asked on their cross the first time and it was never gone into on my redirect. It's been asked and answered prior.

MR. HAHN: I'm following up on his answer.

THE COURT: I'll permit it one more time. It's been asked and answered several times.

THE WITNESS: The Defendant is reporting it, his mother is reporting it. In the records from the Court system, she reported it to the juvenile probation officers. It's documented in multiple places that he has been involved with drugs since around the eighth grade.

MR. HAHN: No further questions.

MR. SAUNDERS: No, sir, I am through with Doctor Nelson.

THE COURT: Any further need for

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**VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON**

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

| | | |
|---|---|---|
| OFFENSE | : | Use of a firearm (F) |
| CODE SECTION | : | 18.2-53.1 |
| OFFENSE DATE | : | 8/9/96 |
| INDICTMENT NO. | : | 1296-212 |

**CRIMINAL ORDER**

| | | |
|---|---|---|
| Attorney for the Commonwealth | : | Linda Curtis |
| Attorney for the Defendant | : | J. Robert Harris |
| Court Reporter | : | Jean M. Brawley |

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

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**VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON**

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

| | | |
|---|---|---|
| OFFENSE | : | Attempted Robbery (F) |
| CODE SECTION | : | 18.2-26 & 18.2-58 |
| OFFENSE DATE | : | 8/9/96 |
| INDICTMENT NO. | : | 1296-211 |

**CRIMINAL ORDER**

| | | |
|---|---|---|
| Attorney for the Commonwealth | : | Linda Curtis |
| Attorney for the Defendant | : | J. Robert Harris |
| Court Reporter | : | Jean M. Brawley |

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Attempted Robbery, as charged, in violation of Code Section 18.2-26 & 18.2-58.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

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**VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON**

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

| | | |
|---|---|---|
| OFFENSE | : | Use of a firearm (F) |
| CODE SECTION | : | 18.2-53.1 |
| OFFENSE DATE | : | 8/9/96 |
| INDICTMENT NO. | : | 1296-210 |

**CRIMINAL ORDER**

| | | |
|---|---|---|
| Attorney for the Commonwealth | : | Linda Curtis |
| Attorney for the Defendant | : | J. Robert Harris |
| Court Reporter | : | Jean M. Brawley |

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

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**VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON**

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

| | | |
|---|---|---|
| OFFENSE | : | Maiming (F) |
| CODE SECTION | : | 18.2-51.2 |
| OFFENSE DATE | : | 8/9/96 |
| INDICTMENT NO. | : | 1296-209 |

**CRIMINAL ORDER**

| | | |
|---|---|---|
| Attorney for the Commonwealth | : | Linda Curtis |
| Attorney for the Defendant | : | J. Robert Harris |
| Court Reporter | : | Jean M. Brawley |

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence as to malicious wounding and reduce on the grounds orally assigned and made a part of the stenographic record of this case, which motion the Court doth deny and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Maiming, as charged, in violation of Code Section 18.2-51.2.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

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**Forensic Psychology Associates, L.L.C.**
13618 Hull Street Road,
Suite 108, Midlothian, Virginía 23112
Voice: (804) 739-4669
Fax: (804) 739-6725

[Names And E-mail Omitted In Printing]

**CAPITAL SENTENCING EVALUATION**

January 15, 1998

Bryan L. Saunders, Esq.
P.O. Box 1633
Newport News, VA 23601-0633

**RE:** ATKINS, Daryl

Dear Mr. Saunders:

Daryl Atkins has been charged with the capital murder, abduction, robbery and related felonies of Eric Michael Nesbitt. A co-defendant, William Jones, is charged with first degree murder. The offenses are alleged to have occurred on August 16, 1996, in York County. Per a court order of October 29, 1997, the undersigned performed a capital sentencing evaluation of the defendant upon motion of the defense, and is assisting defense counsel in the preparation and presentation of mitigation pursuant to VA code § 19.2-264.3:1(A,C). The following report summarizes the undersigned's opinions based upon the data available at this time.

SOURCES OF INFORMATION

1. Court order for the capital sentencing evaluation on motion of the defense.

2. Pre-disposition report of 1/9/96 from the Hampton J&DR Court for two counts of robbery.

3. Pre-disposition report of 11/21/91 from the Hampton J&DR Court for breaking and entering and grand larceny.
4. Presentence report of 4/15/97 for the Hampton Circuit Court on charges of robbery, abduction, use of a firearm, and aggravated maiming.
5. Hampton Court Service Unit school report.
6. Hampton City Schools transcript for 92-93, 93-94, and 95-96 academic years, and accompanying notes, as well as a telephone interview with Warren Kempf, a guidance counselor at Bethel School (757-825-4400).
7. Middle Peninsula Regional Security Center and York County Jail medical records for treatment of a gunshot wound to the foot.
8. Autopsy report for decedent Eric Michael Nesbitt.
9. Transcript of the Daryl Atkins' statement to police on 8/21/96.
10. Transcript of William Jones' statements to police on August 5th and 6th of 1997.
11. Results of the Wechsler Adult Intelligence Test – III (WAIS-III) administered to the defendant as part of this evaluation.
12. Interviews with the defendant's father (Phillip Atkins) and mother (Elvira Bullock).
13. Interviews with the defendant on 11/25/97 and 1/8/98.

## NOTIFICATION OF PURPOSE

Prior to beginning the interviews, the purpose of the evaluation was explained to the defendant. Mr. Atkins



was advised that copies of this report would be sent to his defense attorney and that the report would initially be confidential. He was told, however, that if notice to present expert testimony was given through defense counsel, then this report would be forwarded to the Commonwealth's Attorney and no longer confidential. He was also told that statements he made regarding the offense could not be used as aggravation against him at the sentencing phase, but could be introduced as rebuttal to mitigation [VA code § 19.2-264.3:1 (G)]. This was explained to him in simple language that was appropriate for a defendant of limited intellect. Mr. Atkins was asked to explain back the notice of purpose several times, and at the beginning of each interview, to ensure he understood what this evaluation was about.

Mr. Atkins was advised that this psychologist is obligated to form unbiased opinions, but does have a statutory duty to assist the defense in the preparing and presenting information which might be mitigating. He understood that during cross examination the prosecution would ask questions not in the defendant's interests, and that this expert would respond truthfully.

## GENERAL OFFENSE INFORMATION

Daryl Atkins and William Jones are accused of abducting, robbing, and murdering Eric Michael Nesbitt in York County on August 16, 1996. At the time, Mr. Atkins was 18 years old and the co-defendant was 26 years old. They forced the decedent to go get money for them from an automated teller machine. Later, they drove to the woods where the defendant was shot eight times

and killed. Mr. Atkins himself was shot in the leg. After the murder of Mr. Nesbitt, Mr. Jones drove Mr. Atkins to a local hospital for treatment. The decedent's body was left in the woods. Both defendants confessed to some degree of participation in the offense.

## MENTAL STATUS DURING THE EVALUATION

Daryl Atkins was 20 years old at the time of this evaluation. He is an African American male of average height and build with no obvious identifying marks upon his person.

Mr. Atkins was oriented to the month, year, and where we were. He was unsure of the specific date at both our meetings; this could have been the normal disorientation to time that occurs with long-term incarceration, or attributable to his limited intellect. He complained of occasionally hearing fleeting voices, but upon investigation these were not psychotic hallucinations but more like loud thoughts to himself. This is not an uncommon symptom among individuals who have limited intellect and are under stress, such as awaiting a capital murder trial. His ideas were rational and there were no signs of delusions or thought disorder.

Mr. Atkins mood was mildly depressed at both interviews and he complained of some difficulties sleeping, ruminating on his forthcoming trial, and some hopelessness about the future. The depression did not interfere with his capacity to understand his legal situation or assist his attorneys.



The defendant's answers to questions were very brief, and it was hard to elicit information from him. His parents reported he has always been like this and his statement to police, while under stressful circumstances, was also marked by brief answers. His words were adequately articulated so that they could be understood. Based upon his presentation, the results of psychological testing, and his social history, there was no reason to be concerned about any severe neurological deficits that would affect his mental state under normal conditions.

## PSYCHOLOGICAL TEST RESULTS

Daryl Atkins was administered the WAIS-III intelligence test. His Full Scale IQ score of 59 falls in the range considered Mild Mental Retardation. Less than 1% of the American population at large have a score of 59 or below. A summary table of IQ data follows:

**WAIS-III DATA**

**Verbal Scales**

| Subtest | Scaled Score |
|---|---|
| Vocabulary | 3 |
| Similarities | 3 |
| Arithmetic | 3 |
| Digit Span | 4 |
| Information | 5 |
| Comprehension | 3 |
| Letter-Number Sequencing | 3 |

**Verbal IQ** **64**

**Full Scale IQ = 59**

**Performance Scales**

| Subtest | Scaled Score |
|---|---|
| Picture Completion | 2 |
| Digit Symbol-Coding | 3 |
| Block Design | 4 |
| Matrix Reasoning | 4 |
| Picture Arrangement | 6 |
| Symbol Search | 4 |
| Object Assembly | optional test, not administered |
| **Performance IQ** | **60** |

The possibility that Mr. Atkins was malingering his performance on the IQ test was considered and ruled highly unlikely. From the available school records, it was evident that this defendant had always been of limited intellect. In 8th grade, he scored at the 15th percentile on standardized achievement tests; in 10th grade, he scored at the 6th percentile; he failed drivers education twice; and he barely passed the Virginia Literacy Passport subtests on reading and math. Furthermore, although a presentence report from 5/1/97 reported that the defendant was never in "Special Education," that is incorrect. After consultation with a Bethel High School guidance counselor who reviewed the defendant's transcript, it turned out that Mr. Atkins was, indeed, placed in a lower level classes for slow learners and in classrooms with intensive



instruction to remediate deficits. Furthermore, persons who are malingering IQ tests usually have an uneven pattern of scores on the multiple subtests because they do not know how many questions to answer accurately versus pretend not to know, and the results of Mr. Atkins' test was a fairly uniform pattern of scores.

Mr. Atkins IQ score might have been slightly higher if he were not mildly depressed at this time. However, it is unlikely that his scores would have improved so dramatically as to disqualify for him for the diagnosis of Mental Retardation. His depression was not that severe, and his scores on the subtests which are most sensitive to reduced performance in depressed individuals were not particularly low. And, as noted above, his limited intellect has been a consistent feature of his personality throughout life. His IQ score of 59 at this time is not an aberration, malingered result, or invalid test score, in the opinion of the undersigned.

## OPINIONS

*(i) Whether the defendant acted under extreme mental or emotional disturbance at the time of the offense.*

**From the data available, it is the opinion of the undersigned that Daryl Atkins was voluntarily intoxicated on substances at the time of the offense.** While these are technically considered mental illnesses in the taxonomy of the *DSM-IV* manual of diagnoses, they may not be considered so under Virginia law and the preamble to the *DSM-IV* explicitly states that inclusion of a category of mental illness is not meant to supplant a legal decision by the court of jurisdiction.

*(ii) Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired.*

**From the data available to the undersigned, there were no indications that Daryl could not appreciate the nature of his behaviors nor control himself.** It is notable, however, that intoxication does impair judgement and self-control to some degree, even when it is voluntary. Intoxication may be relevant to mitigation in general because it is relevant to his mental state at the time.

*(iii) Whether there are any other factors in mitigation relating to the history or character of the defendant's mental condition at the time of the offense.*

**In the opinion of the undersigned, the defendant meets criteria for the diagnosis of Mild Mental Retardation.** This is substantiated by his Full Scale IQ score of 59 using the newest version of the Wechsler Adult Intelligence test. The diagnosis of Mild Mental Retardation requires deficits in both intelligence and the capacity to function independently. Information from his family members and school records substantiated him to have a reduced repertoire of behaviors consistent with a limited intellect, in that Mr. Atkins has limited literacy, could not do his own laundry, rarely was able to cook meals for himself, and had never lived on his own, and other basic life skills that most defendants his age have mastered.

Persons with Mild Mental Retardation have reduced judgement, a reduced ability to understand social situations, are less likely to be able to obtain and maintain employment, and may be more susceptible to social influence by others who are smarter or older. On the whole,



they are more likely to be followers than independent thinkers and leaders. Mental Retardation may be mitigating as specified in the Virginia code. Despite the general perception that Mental Retardation is common among capital defendants, this is not true. The undersigned has evaluated over 40 capital murder defendants in the Commonwealth of Virginia and Mr. Atkins is only the second individual who met criteria for mental retardation.

Mr. Atkins has a conviction history of multiple robberies with confrontation of victims, use of a firearm, and a conviction for having shot (but not killed) a previous victim. Most of these offenses occurred in a five month time frame when the defendant was binging on drugs and alcohol. And, most of the offenses took place with co-defendants. If the defendant had successful substance abuse treatment and could be placed in a supervised home, then his risk of future dangerousness if released to the community might be manageable through intensive structure and supervision. **Without these, however, his risk of aggression if released to the community at this time would remain high because of his age, drug habit, and limited intellect.**

However, this is a life without parole offense. The psychological research on risk assessment has consistently demonstrated that the environment in which one will live is relevant to future dangerousness. **By contrast to if he were in the community at large, it is the undersigned's opinion that Mr. Atkins' risk of aggression within the prison system is very low.** Past behavior remains the strongest predictor of future behavior, and in 16 months of pretrial incarceration the defendant has never been aggressive at the jail, violated major rules,

smuggled in or used drugs, or posed a behavior problem. Psychological research on criminal defendants suggests that, as a group, capital murder convicts may present less risk of violence within the prison as compared to other types of offenders. Furthermore, the Department of Corrections does an excellent job of controlling aggression in a population composed of our most violent citizens, as evidenced by the data published via the federal Bureau of Justice Statistics. Mr. Atkins risk of violence during a lifetime of incarceration would decrease as he aged, and some research suggests that prisoners become more mellow and conformist to the rules as they age. Information from his school records indicates that Mr. Atkins actually responds well to structured settings, as one would expect from a retarded individual. During his senior year of high school, he was placed in a special school with a student to teacher ratio of 5:1. In that intensely supervised environment, his grades substantially improved. Prison is a highly structured environment, and may have the same beneficial effect on Mr. Atkins' behavior.

The opinions in this report reflect the data available at this time. If additional data become available, I will be happy to review them and issue an addendum if they substantially modify my opinions.

/s/ Evan Nelson Ph.D.
Evan Nelson, Ph.D.
Licensed Clinical Psychologist

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[Entered As Exhibit In Atkins Trial
April 28, 1998]

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF YORK

| | |
|---|---|
| COMMONWEALTH OF VIRGINIA<br>V.<br>WILLIAM ALFREDRICK [sic] JONES | #96-8230 |

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents during the trial of the case of Commonwealth vs William Alfredrick [sic] Jones, tried in the Circuit Court for the County of York, at Yorktown, Virginia, on February 26, 1998, before the Honorable Prentis Smiley, Jr., Judge of said Court.

* * *

[14] Frederic Troy Lyons

A Yes, sir, he did.

Q And were you able to substantially verify the veracity of those statements?

A I was able to determine the identity of the individual he named, and the relationship that individual had with Mr. Atkins.

Q Did he also tell you how the site was selected as far as the death – the death scene, specifically, the location of Atkins' grandfather's house?

A Yes, sir, he – he stated that Mr. Atkins was familiar with the area and had a grandfather that lived nearby to that area.

Q And, in fact, did you locate that – that grandfather?

A Yes, I did. He lived on Lee Road, which is about two and a half miles from that location in the Yorktown/Lackey area of the County.

Q Since you have – begin – questioning and working with the Defendant in 1997, have you found him to be cooperative and truthful in your investigation of what he has told you about this incident?

A Yes, sir.

MR. SMITH: That's all the

* * *

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[Court Colloquy]

[38] testimony that my behavior put me here, not nobody else's, nobody else forced me, but my behavior.

And so this – from that note there is that I apologize. I just can't – I can only do – I'm very emotional, I'm very sorry for my behavior, my part of it.



I'm just – even though I didn't pull the trigger, I'm just as much to blame, even more, because I was the one who bought – he couldn't buy the liquor, I bought it. I went to 7-Eleven and bought it.

He might have – could've got the weed, you know, I – I don't know about that, but I know if I wasn't there, if I would have did one thing is, my first conscience told me, go home. If I would have went home to my father, I wouldn't be in this mess now.

THE COURT: The Court was not charged with making factual determinations in your testimony. The jury was charged with that responsibility.

You're under an obligation with your plea agreement to cooperate and to testify truthfully. That's your obligation. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And the Court was [39] not charged with making a determination as to whether you were testifying truthfully. That was the jury determination, as to whether you testified truthfully.

Do you understand that?

THE DEFENDANT: Yes, sir, I definitely understand that.

THE COURT: The recollection the Court has of your testimony, on the evening of August the 17, 16th and 17th, 1996 –

THE DEFENDANT: Yes, sir.

THE COURT: – at the place of the killing, on Crawford Road in York County, do you recognize that your testimony does not corroborate any of the forensic facts?

THE DEFENDANT: Does not corroborate?

THE COURT: No, sir.

THE DEFENDANT: No, I do not know that.

THE COURT: You indicated Mr. Nesbitt was not in the vehicle when he was shot, ever; is that correct?

THE DEFENDANT: Yes, I did.

THE COURT: Five feet away –

THE DEFENDANT: Yes, sir.

* * *

[Court Sentencing Jones]

[55] THE COURT: The Court is going to leave the sentencing guidelines attached. The Court will fill out the attendant sentencing guidelines that are appropriate to the two convictions, because the Court will need to fill out those guidelines to show why it has varied and departed from the sentencing guidelines. I will do so because of the absolute atrocity of this crime.

I don't know that it needs – those go to the Guidelines Commission, and I don't think that they're important, other than to the Guidelines Commission.

So if you're asking me to delete them, I can; I think it makes no difference.



MR. SMITH: My understanding was that they somehow ended up with the Department of Corrections office, but if they go no farther, then –

THE COURT: Once it's outside of this Court it goes to DOC. The Court is finished with its responsibility.

So we'll make proper inquiry to that, and if they need to be deleted to release that – then the Court certifies that Mr. Jones was present through all stages of these proceedings.

MS. ADDISON: Your Honor, if we

* * *

VIRGINIA: IN THE CIRCUIT COURT FOR
THE COUNTY OF YORK

| | | |
|---|---|---|
| COMMONWEALTH OF VIRGINIA | : | CASE NO. 98-8229 (6) |
| VS | : | |
| DARYL RENARD ATKINS | : | |

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents during the hearing in the above-styled cause, held in the Circuit Court for the County of York, at Yorktown, Virginia, on April 28, 1998, before the Honorable Prentis Smiley, Jr., Judge of said Court.

[Defense Argument At Post-sentencing Hearing]

* * *

[11] York authorities. It's not really clear which, the report and the statement shows August 5-6 of 1997, almost a year after the events of the crime. Again, Mr. Jones admitted that the crimes were committed but denied being the shooter. He blamed that on Daryl Atkins.

We ask today what happened between Atkins' statement on August 21st of 1996 and Jones' statement in August of 1997 except the forensics reports, which had been introduced.

Well, on March the 7th, of 1997, it shows from the probation report that's been introduced in evidence today



Mr. Atkins was convicted of 18 felonies in Hampton. You will also see, and I'm sure have noted, your Honor, from the reports that are in that probation report, these convictions were mainly based on confessions that Mr. Atkins had made, and that would be referenced to in his probation report, pages 4 and 4-A.

You'll also notice from those reports that Atkins had a gun only in the Hamlin maiming and attempt robbery, which crime he admittedly did alone. Only other individuals had guns in the rest of the Hampton crimes.

And as a result of those convictions of Mr. Atkins in the City of Hampton, he was sentenced to life in prison and a hundred and six years. And that was

* * *

ROBERT S. BROWN, JR., M.D.
DIPLOMATE OF THE AMERICAN BOARD OF
PSYCHIATRY AND NEUROLOGY
DIPLOMATE OF THE AMERICAN BOARD OF INTERNAL MEDICINE
CLINICAL ASSISTANT PROFESSOR INTERNAL
MEDICINE AND PSYCHIATRY
505 FAULCONER DRIVE, SUITE 1B
CHARLOTTESVILLE, VIRGINIA 22903

TELEPHONE: (804) 293-4200
FACSIMILE: (804) 979-7221

PSYCHIATRY FORENSIC PSYCHIATRY
CONSULTATIVE INTERNAL MEDICINE

June 30, 1999

The Honorable N. Prentis Smiley, Jr.
Circuit Judge, 9th Judicial Circuit
300 Ballard Street
Yorktown, Virginia 23690

**Re: Commonwealth v. Daryl Renard Atkins**
**York County/Poquoson Circuit Court Docket No. 8229**

Dear Judge Smiley:

In response to your court order for the psychological evaluation of Daryl R. Atkins, entered June 13, 1999, I traveled to Sussex #1, on Friday, June 25, 1999, and conducted a forensic psychiatric evaluation of the defendant. The court order called for Mr. Atkins to be evaluated concerning his capacity to understand the proceedings against him, his ability to assist his attorneys, and any possible need for mental health treatment. As part of the evaluation process, it was necessary to review the documents listed below.



**Sources of Information**

1. Forensic psychiatric evaluation of Daryl Renard Atkins at Sussex #1, by the undersigned on June 25, 1999.

2. Capital sentencing report, psychological testing results of Daryl Atkins prepared by Evan Nelson, Ph.D, dated January 1998.

3. Daryl Atkins' records from Hampton City Schools

4. Handwritten letters prepared by Daryl Atkins.

5. Virginia Department of Corrections records of Daryl Atkins inclusive of current offense information, Presentence and Postsentence Investigation Report, School reports, Educational Transfer Summary, Juvenile Criminal History, Adult Criminal History Summary, Family Environmental Information, Offender Personal History, Community Supervision Plan and Summary, Criminal History Attachment, and Victim Impact Statement.

6. Mental Health Screening Form regarding Daryl Atkins, dated January 5, 1998.

7. Portion of trial transcript regarding Dr. Nelson's testimony given in Daryl Atkins' trial.

8. Documents regarding the Commonwealth of Virginia v. Daryl Renard Atkins:

   A. Grand Jury charges against Daryl Atkins, dated November 19, 1996.

   B. Order for Psychological Evaluation of Daryl Atkins, dated June 2, 1999.

9. Letter prepared by Dr. Nelson regarding Daryl Atkins, dated June 9, 1999.

10. Various correspondence from George M. Rogers, III, Esq., and Eileen M. Addison, Commonwealth's Attorney.

11. Telephone conference with attorney, George M. Rogers, III, on June 29, 1999.

**Information Concerning the Crime**

According to York County Commonwealth's Attorney, Eileen M. Addison, the following accurately describes the criminal case that led to Mr. Atkins conviction for capital murder and the death sentence.

> On Friday, August 16, 1996, Eric Nesbitt, a twenty-one year old airman, left his second job at an Advance Auto Parts store in Hampton, Virginia around 11:30 p.m. He went to the Crestar Bank across the street, went through the drive thru ATM and got $60.00 cash at 11:58. The transaction was recorded on video tape. Eric then stopped at a 7-11 store on the outskirts of Langley Air Force Base to get a midnight snack. Eighteen year old Daryl Atkins and a companion, William Jones, were at the 7-11 late in the evening. Atkins borrowed a pistol to take with him to the store. When Eric attempted to leave the store parking lot, Atkins and Jones abducted him at gunpoint. Jones got in the driver's seat and Atkins got in the passenger seat, keeping Eric sandwiched between them. Atkins and Jones robbed Eric of the cash he had on him and forced him to go back through the same drive-thru ATM at Crestar Bank and withdraw an additional $200.00. The video camera also captured this transaction on tape recording the date, time and all three occupants of the vehicle.
>
> Atkins and Jones then took Eric to a sparsely populated area of York County. Atkins got out of the vehicle and ordered Eric out. As Eric stepped from the truck, Atkins began shooting. With bullets flying into the cab of the truck, Jones bailed out through the driver's window, ran around the rear of the truck and grabbed Atkins causing Atkins to shoot himself in the left, lower leg. Atkins and Jones fled the scene leaving Eric's body on the ground riddled with 18 bullet holes. Around 1:30 a.m., Jones dropped Atkins off at Riverside Hospital where he received medical attention for the gunshot wounds to his leg.
>
> A passerby discovered Eric's body around 4:30 a.m. Eric was identified by the Advance Auto Parts paycheck still in his pocket. Investigators learned that Eric banked at Crestar Bank. The video tape showing his last two transactions was found to show Eric in his truck sandwiched between two, unknown black males. Atkins and Jones were identified after still photos from the video were distributed to the media.
>
> Atkins pled guilty to robbery and abduction but entered a plea of not guilty to the capital murder charge. He was convicted of capital murder and sentenced to death after a week-long jury trial. Jones testified against Atkins pursuant to a plea agreement that provided that Jones' punishment would be determined by a judge after a presentence report. Jones was ultimately sentenced to life imprisonment.



**Procedural Background**

According to information supplied to this forensic psychiatrist, Daryl Atkins, in February 1998, was tried and convicted of the capital murder of Eric Nesbitt, and he was sentenced to death. The Supreme Court of Virginia upheld the jury's finding of guilt but reversed the death sentence and remanded the case for resentencing.

The issue was an error that appeared on the verdict form. The jury found that the death sentence was justified because Mr. Atkins allegedly posed a serious threat to society and his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman. The Supreme Court reversed the death sentence because the verdict form did not provide the jury with the option of sentencing the defendant to life in prison if they found neither of the aggravating factors of future dangerousness or vileness.

**Information from Prior Psychological Evaluations**

Psychologist, Evan S. Nelson, Ph.D., evaluated Daryl Atkins and prepared a capital sentencing evaluation report dated January 15, 1998. Dr. Nelson's evaluation of Mr. Atkins was conducted pursuant to a court order, which provided the psychologist's services to defense counsel to assist in preparation and presentation of mitigation at sentencing. It was Dr. Nelson's opinion that when this was explained to Daryl Atkins, Mr. Atkins meaningfully understood the purpose of the evaluation and the limits of confidentiality.

The psychologist described Mr. Atkins as being oriented to person, place, month and year. Mr. Atkins tended to answer questions in short, brief sentences, but his speech was easily understood and appropriate to the material being discussed. The psychologist concluded that there was no reason to be concerned about any severe neurological deficits regarding the defendant. The defendant was noted to be mildly depressed with complaints of some difficulty sleeping, ruminations about his



trial, and some hopelessness about his future. However, the psychologist did not believe that the depression interfered with Mr. Atkins' capacity to understand his legal situation before the law or that it would prevent him from assisting his attorneys. No treatment was suggested or provided regarding the depression.

Mr. Atkins was administered the WAIS-III intelligence test, and scores of 64, 60, and 59, were described for verbal, performance, and full-scale IQ scales, respectively. Dr. Nelson was of the opinion that Mr. Atkins did not malinger while producing these IQ scores as they were in keeping with his educational performance. He was of the opinion that Mr. Atkins' IQ scores would have been slightly higher had he not been mildly depressed at testing but thought the defendant met diagnostic criteria for mild mental retardation. He deemed Mr. Atkins to be in need of substance abuse treatment.

Additionally, he stated that Mr. Atkins would benefit from the highly structured environment found within the prison setting.

**Current Evaluation**

**Clinical Interview**

Prior to beginning the evaluation, Mr. Atkins was informed of the identity of the examiner, the purpose of the examination, and the actual court order was read aloud to him. While he had not heard that I was coming to visit him, once he understood the nature of the visit and the content of the court order, he agreed to voluntarily participate. His answers were almost always brief

and to the point. Mr. Atkins denied taking any prescription medications at this time, and he denied having any allergies to medications. When questioned about a possible history of head injury, he denied ever having lost consciousness, but did recall being hit pretty hard and knocked down during a fight in the seventh grade.

Mr. Atkins stated that he was born in Newport News, Virginia, and attended public schools. He was able to name them without difficulty and recalled attending classes at York County/Williamsburg Jail. He has not taken courses since entering prison. He denied being the victim of physical, emotional, or sexual abuse within his childhood. He denied having a history of victimization. He admitted to a history of alcohol and substance abuse problems before his arrest and subsequent conviction. Recently, he refused urine drug screen testing on two occasions and could not or would not inform the examiner of his reasons. Concerning his sexual development, he first had sexual intercourse with a female at the age of sixteen or seventeen. He has not fathered children and estimates that he has had four or five different female partners during his lifetime. Mr. Atkins denied having any homosexual experiences. He declined to discuss his knowledge of safe sex practices.

According to Mr. Atkins, he has never held a valid driver's license and did not previously attempt to acquire one. When asked why, he stated that he used the bus system as his primary mode of transportation.

While reviewing his medical history with the examiner, he reported a history of asthma that does not require medication. He recalled having the bullet removed from



his left ankle and wearing a cast for this in 1996. He denied other fractures or serious injuries. When asked to describe his current situation, Mr. Atkins stated that he lives in a single cell. In the cell, he has a television, with cable, and a Walkman. He watches BET, ABC, TNT, TBS, and FOX. His favorite program is Rap City. Throughout the night, he enjoys television movies, primarily on the USA channel. He recalled recently having seen part of the *Ellie Nesler* story, stating, "I remember a little of it." Mr. Atkins smokes cigarettes, listens to music, watches television and reads *Vibe* and *Playboy* magazines. Each month, he receives a new magazine, which he orders with money given him by his family and friends. Mr. Atkins also keeps rap music cassette tapes, deodorant, hair grease, a toothbrush, toothpaste and a Bible in his cell.

Mr. Atkins exercises on Monday, Wednesday and Friday, approximately two hours each day. His workouts consist of eight sets of 25 push-ups; six sets of 40 sit-ups; fifty jumping jacks and running in place for twenty minutes. Mr. Atkins showers three days a weeks, after his workouts.

He described the food at Sussex #1 as "average". He reported eating all of the food brought to him. In addition, he consumes a 40-cent bag of Doritos daily, which he orders from the commissary. A prison counselor, Ms. Davis, occasionally visits him and handles "the visitation forms." He recalled that another female counselor has visited him on two or three occasions to talk about his adjustment to prison. He viewed her as being "somewhat helpful." Mr. Atkins receives visitors, which have included his father and paternal grandmother. He makes telephone calls to his mother and father, primarily on

Sundays. He would gladly see Dr. Nelson if he visited again and said the same about Mr. Rogers and Mr. Saunders. Mr. Atkins' sleep schedule has made visitation difficult.

Daryl Atkins reported that he sleeps from 7:00 a.m. until 2:00 p.m. He goes to sleep after eating breakfast. He awakens briefly for lunch and then naps until 2:00 p.m. He estimated his current weight to be 167 pounds, which, by his account, is more than he weighed at the time of his arrest. At night, he listens to rap music and watches television. In his mind, sleeping during the day may account for why he missed two or more visitors. He described his concentration as good if he is interested in the topic. He denied having crying spells at anytime for the past year and a half. Mr. Atkins keeps legal papers pertaining to his capital murder case in his cell for reference. He denied having homicidal or suicidal ideation.

At this point, Dr. Nelson's letter from June 9, 1999 was reviewed with Mr. Atkins. He did not recall declining to accept visitors. Instead, he said that he would gladly meet with family members and anyone else who cared to visit him. He informed the examiner that going outside for exercise tended to be futile because there are no outside basketball goals or exercise equipment for death row prisoners. Instead, he described this as a "cage". Guards verified this characterization. Its only benefit is that of "fresh air." He stated that if the death row outdoor area had basketball goals, free weights and music, he would use the facility.

Daryl Atkins was asked whether he sensed any depression. He stated, "Yes, my sleep pattern is messed



up." He indicated a willingness to take medication that would help him sleep and/or improve his mood. However, he could not comment on the severity of his depressed mood, which he characterized as intermittent. Ideally, he would like to fall asleep at 2:30 a.m., arise for breakfast, and then sleep until lunch. He described the sleep schedule as being the only symptom and/or situation he would like to improve. He described his energy as being a bit low at times and his concentration as "So, so – sometimes a little low." He did not report that his self-esteem was particularly low, but he did describe feelings of hopelessness and some difficulty making decisions at times. He expressed the view that his condition has been this way for the past seven to nine weeks. Yet, he does not report a loss of enjoyment, and his depressed mood is not pervasive. Also, he does not appear to be significantly anxious, and he did not describe symptoms of anxiety.

Mr. Atkins was asked a variety of questions to determine his competency to meaningfully participate in his resentencing hearing. When asked if he was present when Mr. Nesbitt was shot, the defendant responded, "Ask my lawyer." His answer was the same when asked if he believed he received a fair trial in 1998. Mr. Atkins demonstrated a clear understanding that capital murder trials involve a guilt and sentencing phase. He knew that he was to receive a new sentencing hearing granted to him by the Virginia Supreme Court. He believed this would occur in August 1999. When asked what he would have his attorneys communicate to the jury at his sentencing hearing, Mr. Atkins said, "That I'm not the person they think I am – not a bad violent criminal." He was not

embarrassed by, and he did not disagree with Dr. Nelson's diagnosis of mild mental retardation. Asked if he wanted the information regarding mild mental retardation communicated to the jury, he stated, "If it helps."

He acknowledged that he loved his family, and he suggested as possible mitigation witnesses, the following individuals: Elvira Bullock, his mother; Philip Atkins, his father; Virginia Atkins, his paternal grandmother; and Michael Bullock, his step father. After additional consideration, he also named Tracy Bullock, his stepsister, as a possible beneficial mitigation witness. He named two possible prison staff members who might be questioned about testifying on his behalf; Ms. Davis and the prison chaplain. Mr. Atkins has had little contact with the prison chaplain, but he expressed a willingness to meet with the chaplain if it would be beneficial.

Daryl Atkins knew that he could represent himself if he chose to do so. Instead, he prefers to be represented, stating his belief that he could work with his attorneys who he named as George Rogers and Brian Saunders. He also expressed having faith in their ability to represent him. When asked about the issue of remorse, Mr. Atkins made a coherent response. Daryl Atkins was given information concerning the challenges of presenting expert mental health testimony at a capital sentencing hearing, namely that doing so can open doors for the Commonwealth's Attorney to harshly question the mental health expert. Approximately thirty minutes later, Mr. Atkins was asked if he recalled the examiner's statement about the most difficult thing regarding the presentation of mental health testimony at a capital sentencing hearing,



and he responded, "Not to expose the case – it would be bad."

When the topic of whether Mr. Atkins would testify at his sentencing hearing was addressed, he stated, "I'd have to talk to my lawyer." When asked what he believed would be a fair sentence, Mr. Atkins stated, "Neither." A moment later, he stated that with regard to his involvement in the case, a fair sentence would be approximately, "Five years." The topic of his gunshot wounds was discussed in regard to his thoughts of what the jury concluded about them during his trial. About this Mr. Atkins said, "I guess they thought I did it." Mr. Atkins knew that the law would only allow him to receive the death penalty if all jurors voted for it. He stated, "money" was the difference between the outcome of his case and other more high profile cases. He understood that the jury could only decide between a life sentence or the death penalty at his resentencing hearing. In this regard, Mr. Atkins hopes he will receive the sentence of life in prison.

To assess his general fund of information concerning the adversarial process in our courts, Mr. Atkins was asked to define various terms. He stated that 'oath' meant a promise to tell the truth and that when people testify they, "tell their story – their side of it." He defined the word perjury to be "lying." Mr. Atkins stated that the judge at his sentencing hearing will follow the law and will rule on the jury's sentence. Additionally, he understood that it was the judge who instructed the jurors concerning the rules that govern the jury's decision making process.

**Mental Status Examination**

Daryl Atkins was alert and oriented to person, place, month and year. He did not know the precise numerical date. He was dressed in prison pants and a tee shirt. His hands were freed from the cuffs but leg shackles remained during the evaluation. His mannerisms were reserved, and his speech was soft spoken. Generally, he was polite, and his affect was reserved, but it was appropriately full range at times. His intellectual skills seemed to be in keeping with the previous diagnosis of mild mental retardation. He could make simple change and performed parts of the serial seven calculations. Mr. Atkins was able to read five sentences out loud for the examiner, suggestive of a sixth grade reading level. When asked to report the months of the year in reverse order, he did so but omitted September and March. He was able to spell the word 'world' backwards without difficulty. On similarity testing, he was correctly able to report all but the most difficult set. For instance, he stated that an 'apple, orange and banana' are fruit; a 'car, bus and airplane' are forms of travel; a 'table, chair and sofa' are furniture; and a 'boy, tree and ant' are all alive. When asked to report the similarity between a 'poem, statue and symphony' he said, "People make them." The fully credited response is art. When Mr. Atkins was informed of this, he remembered it when questioned about it fifteen minutes later, demonstrating ability to learn and remember.

When asked to interpret the proverb, 'Don't cry over spilt milk', he stated it meant, "Don't cry." He said that 'Look before you leap', means "Study before you do something." When asked about the old saying, 'Not all



that glitters is gold', Mr. Atkins said, "It could be fake." Insight testing by interview revealed that the defendant thought that income tax was necessary for "Buildings/ bills", and that child labor laws were important because, "It makes them be older so they can be responsible for the job." The correct answer concerns child abuse prevention.

When questioned about possible hallucinatory experiences, he denied ever having auditory, visual, olfactory, gustatory or haptic hallucinations. There is no evidence that he is now or has at anytime suffered from delusions. Daryl Atkins denied having a history of significant psychiatric treatment, and he denied a family psychiatric history of mental disorders.

**Diagnostic Formulations**

Modern psychiatry calls for the use of a multiaxial assessment system, along five axes in the following manner:

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| Axis I: | Clinical Disorders |
| | Other conditions that may be the focus of clinical attention |
| Axis II: | Personality Disorders |
| | Mental retardation |
| Axis III: | General Medical Conditions |
| Axis IV: | Psychosocial and environmental problems |
| Axis V: | Global Assessment of Functioning (GAF) |

At this time, it is my professional opinion, to a reasonable degree of medical certainty, that the following diagnostic assessment is the most appropriate for Daryl Atkins:

Axis I: Depressive Disorder, Not Otherwise Specified (NOS)
Polysubstance abuse in full remission
Axis II: Antisocial Personality Disorder – by history
Mild mental retardation
Axis III: Remote history of asthma, currently not requiring treatment
Axis IV: Problems related to interaction with the legal system
Axis V: Current GAF score of 65, indicative of some mild symptoms and difficulty in social functioning

Each condition noted above will be described in more detail at this time.

Depressive Disorder, NOS, is a category of depression given to an individual when the depressive features do not meet the criteria for a more clearly delineated disorder. In the case of Mr. Atkins, he likely will prove to have Dysthymic Disorder, which is a chronic mild depressive condition consisting of poor appetite or overeating, insomnia or hypersomnia, low energy or fatigue, low self-esteem, poor concentration or difficulty making decisions, and/or feelings of hopelessness. In order to meet the diagnostic criteria for Dysthymic Disorder, two or more of the above mentioned symptoms must be present for at least two years. Mr. Atkins has some degree of insomnia, low energy, problems with concentration and occasional feelings of hopelessness. However, he has not had these for the necessary two years to qualify for the diagnosis of Dysthymic Disorder. Therefore, the most



appropriate diagnosis would be Depressive Disorder, NOS, at this time.

His history of Polysubstance abuse is noted for the sake of completeness. By his report, he has not abused substances while incarcerated. Therefore, his condition concerning substance abuse is in full remission in a controlled environment.

The Antisocial Personality Disorder describes the pervasive pattern of disregard for and violation of the rights of others occurring since age fifteen. In my opinion, the defendant's multiple arrests and convictions for criminal behavior, which will not be reviewed at this time, strongly suggests that the Antisocial Personality Disorder is accurately recognized in him.

Mild mental retardation is noted among individuals with IQ scores that range between approximately 50 to 70. Individuals with mild mental retardation are generally equivalent with the educational category of "educable." They appear, to be relatively normal in their academic skills in elementary school, but during the teenage years are noted to have academic skills that reach approximately the sixth grade level. People with mild mental retardation usually achieve social and vocational skills adequate for minimum self-support, but they may need supervision, guidance or assistance when under unusual stress. However, those with mild mental retardation, with appropriate support, are usually able to live successfully in the community.

While Mr. Atkins reports a history of asthma, there was no indication of audible wheezing during my evaluation of him, and he denied requiring medication for bronchospasm at this time.

Clearly, his most important psychosocial stressor concerns his previous conviction of capital murder and a new sentencing hearing. Mr. Atkins' current GAF of 65, is in the middle of the range of mild symptoms. This means he has mild symptoms and/or some difficulty in social functioning. Generally, people with mild symptoms are functioning reasonably well and have some meaningful interpersonal relationships.

The depressive disorder described above for Mr. Atkins would be reasonably expected to respond favorably to one of the modern antidepressive agents. Antidepressive medications and counseling would be expected to alleviate his depressed mood and facilitate a more normal sleeping pattern. I suggest that these interventions be offered to him at Sussex #1, without undue delay. My opinions have not been communicated to Sussex #1; this task should fall to another.

**Opinions Concerning Competency**

Based upon my four hour evaluation of Mr. Atkins and a comprehensive review of the records noted in the 'Sources of Information' section of this report, it is my professional opinion, to a reasonable degree of medical certainty, that he currently possesses the capacity to understand the legal proceedings against him in reference to the resentencing hearing. It is also my opinion that he is competent to assist his attorneys in the preparation and



presentation of his case in mitigation. Although he is competent at this time to proceed with the sentencing hearing, Mr. Atkins would benefit from antidepressive medication and counseling to treat symptoms of a mild depressive disorder.

Truly yours,

/s/ R S Brown
Robert S. Brown, Jr., M.D.

cc: Brian L. Saunders, Esq.
George M. Rogers, III, Esq.
Eileen M. Addison, Commonwealth's Attorney

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF YORK

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|---|---|---|
| COMMONWEALTH OF VIRGINIA | : | CASE NO. 99-R1-8229 |
| VS | : | |
| DARYL RENARD ATKINS | : | |

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto and all other incidents during the trial in the above-styled cause, held in the Circuit Court for the County of York, at Yorktown, Virginia, on August 18, 1999, before the Honorable Prentis Smiley, Jr., Judge of said Court, and a Jury.

* * *

[39] Mary Sloan

gentlemen.

THE COURT: Thank you, Mr. Rogers.

Call your first witness.

MS. ADDISON: Thank you, your Honor.

Mary Sloan.

THE CLERK: Mary Sloan, come into the Courtroom, please. Mary Sloan.

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MARY SLOAN,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning. Could you state your name, please.

A Mary Sloan.

Q Ms. Sloan, you might want to pull that microphone down a little closer.

[40] Ms. Sloan, where do you live?

A Gilbertsville, New York.

Q And how big of a town is Gilbertsville?

A It's a village of about 500 people.

Q And how long have you lived there?

A Twenty-one years.

Q Okay. Who else do you live there with?

A My husband and my three youngest children.

Q And how many children do you have, total?

A Five.

Q And what are their names and ages?

A Marshall is 20. Julie is 19. Brenda is 13. Tim is 9, and Ethan is 7.

Q Okay. And your other two children, one is Eric Nesbitt, is that correct?

A That's my oldest son, yes.

Q And how old was Eric when he died?

A He was 21.

Q And your other son that doesn't live with you?

[41] A He's in the Army.

Q Where is he stationed?

A He's at Fort Campbell, Kentucky.

MS. ADDISON: If the witness might be handed Commonwealth's Exhibit 70 through 72. We can do them individually.

BY MS. ADDISON:

Q The Bailiff is handing you what's been marked as Commonwealth's Exhibit 70. Do you recognize that photograph?

A Yes, that's me and my children at our family reunion we went to two weeks before Eric died.

Q Where was that family reunion?

A At my folks' house in upstate New York.

Q Where was Eric living at that time?

A He was in the Air Force at Langley Air Force Base.

Q Can you identify so when the jury sees the picture they can see which one of them is Eric in that picture?



A He's the tall red-haired guy in the back with the impish grin. He must have done [42] something.

Q Does he seem to be laughing in the picture?

A Yeah.

Q Is that characteristic of Eric's personality?

A Yeah, he was known for getting things going and keeping people's spirits up and doing funny things to make people laugh.

Q Where was Eric raised?

A In Gilbertsville.

Q And can you describe for the jury what kind of hobbies or interests he had when he was growing up?

A He liked fishing and camping and hiking and he was in Scouts. He liked sports. He liked playing all kinds of sports.

Q You said that he was in Scouts?

MS. ADDISON: If the Bailiff would hand Ms. Sloan Commonwealth's Exhibit Number 71.

(A document was handed to the witness.)

BY MS. ADDISON:

Q Do you recognize that photograph, Ms. Sloan?

[43] A Yes, that's Eric when he received his Eagle Scout Award in 1993.

Q In 1993?

A Yes.

Q How long was he involved with Scouts?

A Let's see. About 11 years, I think.

Q For the benefit of the members of the jury that may not know, can you describe what's involved in becoming an Eagle Scout?

A The Eagle Scout Award is the highest award a Scout can get. You have to achieve 20 merit badges, which are kind of difficult to do. And you have to do a number of service projects for the community or for your scouting organization, and take on a lot of leadership duties in the scouting organization in order to do that.

Q Do you recall what some of those community projects or leadership roles were that Eric did to earn that?

A Well, for his Eagle Scout service project, he arranged painting of the Masonic Lodge where his Scout troop held their meetings. He had to arrange for materials and people to do the job [44] and clean up and everything involved in that.

Q Anything else?

A He also helped arrange, for one of his service projects, arranged the painting of fire hydrants in town.

Q Was he involved in any other way with the Fire Department or Rescue Squad?

A Yes, he was. He helped organize the Explorer Post in town, which was affiliated with the local Fire Department and Rescue Squad. They had never had one before, and he was instrumental in getting it founded.



And he became a member of the Fire Department when he became old enough to be in it. And he took the training for the first responders and took the training for the Rescue Squad, the Explorer training for the Rescue Squad.

MS. ADDISON: If the Bailiff would hand Ms. Sloan Exhibit Number 72.

(A document was handed to the witness by the Bailiff.)

BY MS. ADDISON:

Q Ask if you recognize that photograph?

A This was Eric with his Explorer Post at the firehouse in front of the rescue truck [45] that they sometimes used.

Q How long was he involved with the Fire Department and Rescue Squad?

A I guess about two years. You have to be 18 to join the Fire Department, but he was with the Explorer Post before then. I think you have to be 16 to be an Explorer. It was about two years before he went into the Air Force.

Q Okay. You say that he was involved in all of this primarily while he was in high school?

A Uh-huh. Yes.

Q And did he, in fact, graduate from high school in Gilbertsville?

A Yes, he did.

Q When was that?

A In 1993, in June.

Q Did Eric work at all in addition to going to school in Gilbertsville?

A Yes, he did. He worked from the time he was about 15 until he was about 18 for our neighbor's dairy farm, helping with chores.

MS. ADDISON: Your Honor, I would move that those three exhibits be readmitted and ask that they published to the jury.

[46] MR. ROGERS: No objection, your Honor.

THE COURT: All right. The Court will admit, without objection, Commonwealth's Exhibit 70, 71 and 72.

MS. ADDISON: Thank you.

(Commonwealth's Exhibits Number 70, 71 and 72 were received in evidence.)

THE COURT: Ladies and gentlemen, at this point I'll explain to you the reason for the sequential number of these things. These exhibits were formerly admitted into the guilt phase of the case and rather than renumbering them, having two numbers on them, we're using the same numbers, okay?

MS. ADDISON: Thank you, your Honor.

BY MS. ADDISON:

Q And how long did he do the farm work while in school?

A About three years.



Q Anything in particular he did with the money he earned from that?

A He was pretty careful with money, and you can't work a lot of hours on the farm anyway [47] when you're that age, so he saved what he made and he put it towards his school clothes and his basketball shoes and running shoes when the time came for those seasons.

Q Helped you out a lot, I'm sure.

A Oh, yeah, definitely.

Q What did Eric do after he graduated from high school?

A He entered the Air Force about two months after he graduated from high school.

Q And where was he stationed initially?

A At Lackland Air Force Base in Texas.

Q Do you recall how long he was there?

A About six months for basic training and technical school.

MS. ADDISON: Ask if Ms. Sloan could be handed Commonwealth's Exhibit Number 1. (A photograph was exhibited to the witness.)

BY MS. ADDISON:

Q Do you recognize that photograph?

A That's Eric in his Air Force [48] uniform.

Q Do you recall when that was taken?

A Right at the beginning of basic training when he was 18.

MS. ADDISON: Your Honor, we'd move that be admitted and published to the jury.

MR. ROGERS: No objection, your Honor.

THE COURT: Commonwealth's Exhibit 1, make it part of the record and the evidence in the case.

(Commonwealth's Exhibit Number 1 was received in evidence.)

BY MS. ADDISON:

Q And where was Eric stationed after his basic training?

A At Langley Air Force Base.

Q In Hampton?

A Uh-huh.

Q When did he move to Hampton, do you recall?

A I think it was February of '94.

Q And from the time he was stationed in Hampton or went into the Air Force, about how [49] often did you have contact with Eric?

A He called occasionally, and then he came upstate about four times a year when he was able to.

Q What was Eric's relationship like with his brothers and sisters?

A Well, he was their big brother and it was a job he took seriously. He was really good with them, and they



were crazy about him. So glad to see him come when he came. And he was good with them, did things with them, played with them and bought them things. He was really great with them.

Q What kind of things would they do when he came back to visit after he went in the Air Force?

A Oh, he would take them places, the younger guys, especially, they were just little – little guys, and they would always want to go to Paddy's Farm, our friends' farm there. And he would come pulling in the driveway in his little truck and the little guys would be bursting out of the house, Eric, Eric, and then they would have a big argument who got to go with Eric in his truck to Paddy's Farm.

And I remember the last Christmas [50] he was home he took them down to the community Christmas tree so they could see Santa Claus come to the community Christmas tree.

Q And did he maintain contact with his friends in Gilbertsville as well?

A Yes, he had a lot of friends in Gilbertsville, and he saw them when he came up. The friends' farm, especially, that I mentioned, he would help out there a lot when he came in.

The last time he came up, he made a special point of helping his friend Andy there fix his pickup truck that he used on the farm there. He spent a lot of time doing that.

Q When was that last visit, Ms. Sloan?

A It was the end of July, 1996.

Q How long was Eric home at that time?

A Three days.

Q And you said you had a family reunion?

A Yes.

Q Who all was at that?

A Well, most of my brothers and sisters and aunts and uncles, and people from all [51] over up and down the East Coast came to it, I guess.

Q And were you aware of any additional jobs that Eric had, other than his work in the Air Force?

A Yes, he had a part-time job at an auto parts store, I believe it was.

Q And do you know why he was doing that extra work?

A He'd had a minor accident with his truck, and he needed a little extra money to pay for the repairs to it.

MS. ADDISON: Your Honor, the Commonwealth would ask that Commonwealth's Exhibit Number 8 be shown to Ms. Sloan.

(A photograph was handed to the witness.)

BY MS. ADDISON:

Q Do you recognize that photograph?

A That's Eric's truck.

Q That photograph shows two trucks, does it not?

A Yeah, Eric's is the small purple Nissen.



Q When did Eric first get the truck?

A In the summer of '95, 1 think.

Q Do you know how he paid for it or –

A He took out a loan to pay for it himself.

Q It appears to be much smaller than the other truck in the picture.

A Yeah, it's just a tiny, it's just a real small truck.

MS. ADDISON: I'd ask that that be admitted as well, your Honor.

MR. ROGERS: No objection, your Honor.

THE COURT: All right. Mark it Commonwealth's Exhibit 8, make it part of the evidence in the case.

(Commonwealth's Exhibit Number 8 was received in evidence.)

BY MS. ADDISON:

Q Ms. Sloan, the last time when Eric was home in July, or on other occasions, did you have an opportunity to discuss with him what his future plans were?

A Yeah, he talked some about possibly staying in the Air Force. There wasn't a [53] lot of opportunity up where we live and he liked the Air Force, liked the people, he had a lot of friends in it. He did say he might make a career of it.

Q Do you know if he had gotten any promotions in the Air Force?

A He didn't tell us, but I guess he apparently had been very close or had gotten one by the time that he came up the last time. He was pretty modest about things.

Q Describe for the jury, if you would, Ms. Sloan, how you were notified of Eric's murder?

A When someone in the military dies they send out a death notification committee. And I happened to be outside on the 17th of August, and I saw a van pulling up and two guys in uniform got out, and I knew something had happened to Eric because you never see anyone in uniform up where we live. And they told me that Eric had been murdered. I couldn't believe it.

Q Was there anyone home with you that day?

A Just the kids, I guess. We had just gotten back from another family reunion and Dan, my husband, hadn't gotten home yet. So I had [54] to track him down. But within ten minutes the house was filled with people from the community, who were just as shocked as we were.

Q Did you have the funeral service there in Gilbertsville?

A Yes. It was packed at the church. It was terrible seeing Eric's coffin up there at the front of the church where he had taken part in so many Sunday School activities and programs. It was hard for the people at Gilbertsville. They didn't understand.

Everybody liked Eric. And they had to come out and talk about him. And some of the people that liked him the



best couldn't even talk about it until a lot later. I felt so bad for them, putting them through that.

Q What about your other children, Ms. Sloan, can you describe for the jury what kind of effect it has had on them?

A I think it was hard on – really hard on Julie because she was really close to Eric. And she was a sensitive teenager, and nothing like that had ever happened anywhere we knew of. And she didn't know how to deal with it.

And Marshall, his next oldest [55] brother, he's kind of a funny guy that doesn't talk much or talk about his feelings or anything. But he – he entered the Army about a year after Eric died, and when he was getting ready to go into the Army, the recruiter told him you're going to be doing some guard duty. And he had done a lot of hiking and camping up in the woods and stuff. And one night he hiked down to the cemetery and slept on Eric's grave. He wanted to be close to him.

And the younger kids, they were so close to Eric, and he was such a great brother to them, they really don't understand. And they can't really talk about it to other people because they just – it's not something that happens around Gilbertsville, and young kids don't understand. But they know that something terrible happened to their brother.

One morning at breakfast Nate sat there and counted, one, two, three, four, five, six, seven, eight. That's how many times Eric got shot. And that's not something you really think of a seven-year-old doing.

Q Did anyone in your family have counseling to try to deal with Eric's murder?

A I had a little counseling after [56] Eric died but it didn't seem to do any good, I just sat there and cried for an hour. I don't know how you can counsel for something like this.

Q I know it's difficult to do, Ms. Sloan. Can you explain to the jury what effect this had on you as a mother in dealing with your other children?

A It's created in me such a big fear that I never felt before. You never think that something like this is going to happen. But now that this has happened to Eric, I really – I'm really scared that something's going to happen to them. I know it's unreasonable and I shouldn't think that way, but I can't help it. And I look at other young children and I think, oh, my God, what's going to happen to them. Is something awful going to happen to them, too?

MS. ADDISON: Thank you. I have no further questions.

THE COURT: Your witness.

MR. ROGERS: Ms. Sloan, we're all so very sorry.

And I have no questions of this witness, your Honor.

THE COURT: All right. Any [57] further need for Ms. Sloan?

MS. ADDISON: No, sir. I'd ask that she be allowed to remain in the Courtroom.



THE COURT: Fine, if there is no further need for her.

And you are excused or you may have a seat in the Courtroom.

THE WITNESS: Thank you.

THE COURT: Next witness.

MS. ADDISON: Mark Armitage.

THE CLERK: Mark Armitage, come into the Courtroom, please.

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MARK ARMITAGE,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning.

A Good morning.

[58] Q Would you state your name, please.

A Mark Armitage.

Q Mr. Armitage, how are you employed?

A U. S. Air Force.

Q And how long have you been in the Air Force?

A In May it will be ten years.

Q Where do you live?

A I live in Rome, New York now.

Q And how long have you been in New York?

A Almost exactly two years.

Q Where were you stationed before that?

A Langley Air Force Base.

Q How long – what period of time were you at Langley?

A I got to Langley in June of '93 and I was there until September of '97.

Q And what division or what exactly did you do in the Air Force?

A I was a vehicle mechanic with First Transportation.

Q And that's when you were at [59] Langley?

A Yes, ma'am.

Q Are you doing the same thing now?

A No, ma'am.

Q You got a promotion?



A Yeah.

Q Good.

MS. ADDISON: Your Honor, the Commonwealth would ask if Mr. Armitage could be shown Commonwealth's Exhibit Number 1.

(A photograph was exhibited to the witness.)

BY MS. ADDISON:

Q Mr. Armitage, I ask you, do you recognize that photograph?

A Yes, I do.

Q And who is that?

A Eric Nesbitt.

Q How is it that you know Eric Nesbitt?

A He was one of my best friends.

Q When did you first meet him?

A When he got to Langley. He got to Langley in January of '94.

Q Okay. And did you work together?

[60] A Yes, ma'am.

Q And explain to the jury, if you would, please, how that relationship developed.

A It's like a close unit, everyone is, like, friends. We would hang out after work. He would come to my house. My wife – him and my wife were in Tech School together. That's where they get trained for their job. They were real

close. We'd barbecue together, just do lots of stuff together.

Q About how often did you and your wife spend time with Eric?

A Saw him every day.

Q Every day?

A Every day. Sometimes twice a day.

Q Can you describe for the jury what kind of person Eric was, his personality?

A He was very kind. He would give his left arm if you needed it. He would give you anything you needed.

Q Anything in particular he ever gave you?

A When I went TDY – that's temporary duty – we go TDY a lot. When I went to Saudi Arabia, he stayed with my wife and watched my [61] wife while she was pregnant, helped her out.

Q What about his work in the Air Force, what kind of worker was he?

A Hard working. Very hard working.

Q Do you know what rank he was or –

A He was about to put the senior airman on.

Q What is that?

A E-4.

Q When was that promotion, do you recall?

A Sunday. He was killed on Friday, and he was supposed to put it on Sunday.



Q Had he been told about the promotion?

A It's automatic, unless you get in trouble, and Eric was not a person to get in trouble.

Q Did you ever have an opportunity to talk to Eric about what his future plans were?

A Yes, I did. He was going to make the Air Force a career.

Q What about how he got along with other people, friends or co-workers?

A To my knowledge, Eric didn't have [62] an enemy in the world.

Q Did you see him on August 16th of 1996?

A Yes, I did.

Q Where was that?

A We had a squadron picnic. It was – I think the squadron got together, they normally get together and have a good time, show squadron camaraderie, get together and have a good time. We played volleyball, softball, all kinds of sports, horse shoes, had a barbecue.

Q Do you recall Eric's mood that day?

A Yeah, he was in a good mood, happy mood, like always. I can't say anything, he was always in a good mood.

Q Did you ever see Eric again after that picnic?

A No, I did not.

Q How did you learn about Eric's murder?

A Detective Lyons, an OSI agent, and another detective came to my house and were questioning me.

Q When was that?

[63] A Saturday morning, the 17th.

Q Can you describe for the jury the effect that Eric's murder had –

MR. ROGERS: If it please the Court, there is a matter I think we need to take up out of the presence of the jury.

THE COURT: All right. Ladies and gentlemen, I'm going to take this opportunity to take our 10:30 recess, and I will ask that you retire to the jury room. Obviously, do not begin your deliberations at this time.

The Court will call you back in about ten or 15 minutes.

Captain, if you could maybe get some of these chairs back there for them.

(The jury retired to the jury room.)

THE COURT: All right. The jury has been retired.

All right, Mr. Rogers.

MR. ROGERS: Yes, sir, if the witness could be excused for a few moments, your Honor.

THE COURT: All right. Sir, if you will please stand down, go outside the hearing [64] of the Courtroom. Don't discuss your testimony with the other witnesses.



Leave the exhibit there.

(The witness was excluded from the Courtroom.)

THE COURT: The witness has also been separated.

MR. ROGERS: Yes, sir. If the Court please, due to the unusual nature of this procedure that deals only on a resentencing and does not get into the proof of the case, I think that what we're going along and what the Defense objects to with Mr. Armitage's testimony, I think that the Commonwealth is getting quite far afield with this matter.

The first witness who testified was the victim's mother. Surely under victim impact we did not make any objection to her testimony on this.

I think that what we're getting into – I realize that there was testimony by this witness at the former trial of this case back in February of 1998. If the Court please, we're under a completely different set of circumstances today. The Defense objects to this continuing testimony,

* * *

[71] A From myself and my wife it was a little difficult. She had the baby three days – she was pregnant. She had our son three days later. They left on Saturday around, I think, four o'clock in the afternoon. I had to call the Chaplain. She wouldn't stop crying. I had no idea how to calm her down. I was trying to deal with it myself and also help her.

Q What about your co-workers in the Air Force?

A Everybody was extremely hurt, didn't understand what was going on, because not only do you not wish this to happen to anyone you know, but especially a person like Eric, who would give you anything you wanted, basically a nice, easy-going, fun-loving guy. And they couldn't believe it happened to him.

MS. ADDISON: Thank you. Answer any questions Mr. Rogers may have.

MR. ROGERS: I have no questions of Mr. Armitage, your Honor.

THE COURT: Any further need for Mr. Armitage?

MS. ADDISON: No, sir, I don't believe so.

[72] THE COURT: All right. Thank you, sir. You're free to go or you may have a seat in the Courtroom.

Next witness.

MS. ADDISON: Sarah Armitage.

THE CLERK: Sarah Armitage, come into the Courtroom. Sarah Armitage.

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SARAH ARMITAGE,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:



DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning. Could you state your name, please.

A Sarah Armitage.

Q Sarah, how old are you?

A I'm 24.

Q Where do you live?

A Syracuse, New York.

[73] Q And how long have you lived in Syracuse?

A Two years, I believe.

Q Where did you live before that?

A I lived in Hampton, Virginia.

Q And how long did you live in Hampton?

A Between Hampton and Newport News, about three years.

Q Okay. And what brought you to Hampton?

A I was in the Air Force.

Q Are you still in the Air Force now?

A I'm still – what am I? I'm active duty in the Air National Guard for New York.

Q And how long have you been with the Air Force?

A With the Air Force? Six years.

MS. ADDISON: If she could be shown Exhibit Number 1.

BY MS. ADDISON:

Q Ask if you recognize that photograph?

A Yes, I do.

[74] Q Who is that?

A That is Eric Nesbitt.

Q How is it that you knew Eric Nesbitt?

A He – I worked with him. We went to Tech School together.

Q Where was that?

A It was a school for our jobs.

Q Where did you go to school?

A Lackland Air Force Base, Texas.

Q Do you know about when that was?

A It was the end of 1993, late December.

Q And how did your relationship develop after Texas?

A Eric was stationed here at Langley in January, and we just – we worked together. We were the same age, same schedule, lived in the same dorm. We just started hanging around.

Q And during that time about how often did you spend time with Eric?



A Every day.

Q Every day?

A Every day.

Q Did you work with him?

[75] A Yes, we worked together and usually did something after work together.

Q What type of worker was Eric?

A He was a hard worker, a good worker. He would do just about anything for anybody.

Q Do you know any specify examples of things that he did for you or other workers?

A As far as – well, once I had a TDY to Cuba, and my husband was in Saudi at the time and he was supposed to be coming back. And Eric knew I didn't want to go to Cuba, so he volunteered for – he volunteered and went for me.

Q He went for you?

A Yes.

Q Can you describe for the jury your relationship with Eric?

A We just – we were really close friends, did a lot of stuff together. We did basically everything together. He was like a brother.

Q Did you ever talk with him about his plans for the future?

A A little bit.

Q Do you know what they were?

[76] A He was going to stay in the Air Force and make a career out of it.

Q Do you know whether or not he ever had any problems with other co-workers?

A No, I don't know of anybody that didn't like him.

Q Okay. Do you recall the last time that you saw Eric?

A It was Thursday night, I believe, before, the night before he was murdered.

Q Where was that?

A That was at my apartment. He had stopped by.

Q Your husband testified about a picnic that happened. Did you go to the picnic?

A No, I was pregnant at the time. I was on bed rest. So I was home.

Q When was your baby due?

A It was due August – I think August 19th or 20th he was due.

Q How did you learn about Eric's murder?

A My husband told me. I don't remember who it was that came to my house. I know an OSI agent, Detective Lyons and another police [77] officer, I don't know who he was. They just questioned us about a bunch of stuff about Eric, and I had no idea. And then they told my husband out in the hallway and told him to come tell me.



Q Were you still on bed rest at that time?

A Yes, I was.

Q I know it's difficult to do, but can you describe to the jury the effect of that news and Eric's murder had on you?

A At first I was yelling, I didn't believe it, said they were full of it, you know. And like then started having contractions. I can't really explain it, because I just – I just lost my best friend.

Q Okay. You considered Eric your best friend?

A Yes, I still do.

MS. ADDISON: Answer any questions Mr. Rogers may have.

CROSS-EXAMINATION

BY MR. ROGERS:

Q What date was your baby born, [78] Ms. Armitage?

A He was born on August 20th.

MR. ROGERS: Okay. Thank you, very much. That's all the questions I have.

THE COURT: Any further need for Ms. Armitage?

MS. ADDISON: No, sir.

THE COURT: All right. You're free to go, Ms. Armitage, or you may have a seat in the Courtroom.

THE WITNESS: Thank you.

THE COURT: Next witness.

MS. ADDISON: George Duncan.

THE CLERK: George Duncan, come into the Courtroom, please. George Duncan.

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GEORGE DUNCAN,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[79] BY MS. ADDISON:

Q Would you state your name, please.

A George Duncan.

Q Where do you live, Mr. Duncan?

A 104 Lakeland Crescent, Yorktown.

Q How long have you lived there?

A Four years.

Q How are you employed?

A I'm active duty Air Force, stationed at Langley Air Force Base.

Q How long have you been with the Air Force at Langley?



A I have been in service for 16 years.

Q And how long have you been stationed at Langley?

A Thirteen of them.

Q Thirteen. Okay.

MS. ADDISON: Again, I would ask that Mr. Duncan – there is a photograph labeled Commonwealth's Exhibit Number 1.

THE WITNESS: I see the picture.

BY MS. ADDISON:

Q Do you recognize that photograph?

A That's Eric Michael Nesbitt.

[80] Q And how is it that you knew Mr. Nesbitt?

A I was Airman Nesbitt's supervisor at Langley.

Q Do you recall when you first met him?

A I had returned from TDY, I believe it was around – I can't remember the year.

Q Okay. About how long were you his supervisor?

A I was his supervisor for the time he was at Langley for two years, almost three years that he was at Langley.

Q Can you describe for the jury what kind of employee he was?

A You know, a young kid, immature, but very responsible. You think, you know, an 18-year-old kid, you

know, he hadn't experienced a lot of life and he didn't know a lot of things, but Eric was a hard worker, and he had a real sense of humor about him. Because of his shyness, he would open up through his sense of humor. So it was nice to have a kid that would work that hard. He knew when to work and when to play, and he had a real good sense of humor.

[81] Q Did he ever have any problems at work with his co-workers?

A Absolutely not. Absolutely not.

Q Did you ever have an opportunity to discuss with him what his plans were for the future?

A I know he planned on staying in the Air Force. He enjoyed it. He had just returned home from a trip with his parents and had talked with them about re-enlisting in the military. I know that he was looking forward, when he was murdered, he was a week away from putting on his next stripe, which was real important to him.

Q What was that promotion?

A That would have been to senior airman.

Q And that was supposed to happen when?

A He was a week away from it when he was murdered.

Q You said that was very important to him?

A Yes, I had to escort Eric home to his family. I had to go through his personal belongings. And he had



already paid and had his [82] uniforms lined up in his closet with his new rank already on his uniforms.

Q Did you stay at Gilbertsville for the funeral?

A Yes, ma'am.

Q Can you describe to the jury what that was like?

A Even now with my 16 years in service, I know escorting Eric home was the hardest thing I've ever done. I was ashamed to take that little boy home in a pine box to his mom. He was a good kid.

Q Do you recall about how many people were in attendance at the funeral?

A I know that over 40 people from Langley alone took it upon themselves to come up to the funeral, plus, of course, the military honor guard and several other things. So there was over 50 people there but there was approximately 40 people from Langley that had taken it upon themselves to drive up there.

Q What about people from Gilbertsville?

A I couldn't count them. The church was filled. It was a small town, but it was packed. [83] You know, there was just so many people you couldn't count them. The church was packed to capacity.

Q You said there were a lot of people from the Air Force. Can you describe for the jury the effect that Eric's murder had on his co-workers?

A I had taken Eric home, so I was there a few days for the funeral, but during the viewing, people who hadn't seen Eric at all since he had left the party, the last

time they saw him alive, so when they got there, it was a few hours before the viewing, and I remember them walking into the funeral home, seeing Eric and instantly walking back out because they couldn't handle seeing him like that. One of my peers, one of the supervisors from the shop just broke down in tears, just seeing Eric in that state, because, again, they hadn't seen him since – the last time they saw him he was alive.

MS. ADDISON: Answer any questions that Mr. Rogers may have.

MR. ROGERS: I have no questions, your Honor. This witness can be excused.

MS. ADDISON: Thank you.

THE COURT: Mr. Duncan, you may [84] have a seat in the Courtroom or you're free to go.

Next witness.

MS. ADDISON: Vivian Brown.

THE CLERK: Vivian Brown, come into the Courtroom, please. Vivian Brown.

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VIVIAN BROWN,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:



DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning. Could you state your name, please.

A Vivian D. Brown.

Q And Ms. Brown, how are you employed?

A I'm employed for the Hampton School System.

Q And what do you do?

A I'm a SIPS coordinator.

[85] Q What is that?

A Detention – it used to be detention, but it's an in-school program for children that cannot deal in the classroom.

Q Do you have any children of your own?

A Yes, I have five.

Q Was there a time that you worked at the Advance Auto Parts Store in Newport News?

A Yes, there was.

Q When was that, do you recall?

A About two or three years ago, something like that.

Q There is a photograph in front of you that's been marked as Commonwealth's Exhibit 1. Ask you if you recognize the person in that photograph?

A Yes, I do.

Q Who is that?

A Eric Nesbitt.

Q How is it that you knew Eric Nesbitt?

A I worked with Eric, and we worked at Advance Auto together.

Q About how long did you work with [86] Eric?

A Two or three months.

Q Can you describe for the jury his personality?

A Eric was a hard-working young man. He was young, because he told me he was 21. And I enjoyed Eric. We worked – the night that he died we closed together. In closing, I mean we were cleaning up, getting the store ready for the next day. Eric was a caring person, because that night when we closed up, I got off earlier than he did, and he asked could he bring my car to me, because it was raining that night. And I told him to just watch me as I got into the car to make sure I was safe. And the last thing I remember was Eric watching me get in my car and saying good night.

Q How did you learn about his murder?

A They called me from work the next day because we were supposed to work together the next day.

Q Can you describe for the jury the effect that his murder had on you and other co-workers of yours?

A It hurt me very bad, ma'am. And [87] the store was pretty upset. And I cried the entire day. It was hard for me to work, because I had just seen him, you know.



MS. ADDISON: Thank you. Answer any questions that Mr. Rogers may have.

MR. ROGERS: I have no questions of Ms. Brown.

THE COURT: Ms. Brown, you may have a seat in the Courtroom or you're free to leave.

THE WITNESS: Thank you.

THE COURT: Next witness.

MS. ADDISON: Investigator Lyons. Your Honor, for this witness we'll be using some of the video equipment.

THE COURT: All right. Sergeant, if you will get that set up for us.

THE CLERK: Investigator Lyons, come into the Courtroom, please. Investigator Lyons.

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INVESTIGATOR F. T. LYONS

called as a witness by the Commonwealth, having been [88] first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Would you state your name, please.

A Investigator Troy Lyons.

Q And how are you employed, Mr. Lyons?

A Employed with the York County Sheriff's Office, work in the Criminal Investigations Division.

Q And how long have you been so employed?

A Been with the Sheriff's Office it will be 11 years in September.

Q And how long have you been an investigator?

A It will be eight years in October.

Q Okay. Any special training or experience as part of your job?

A I've gone through a number of crime scene processing courses, fingerprint processing courses, fingerprint identification. [89] Also, I attended ten weeks of the Virginia Forensic Science Academy.

Q Were you so employed on August 17th of 1996?

A Yes, I was.

Q And were you involved in the investigation of the murder of Eric Nesbitt?

A Yes, I was.

Q And what was your involvement in that?

A I was contacted at approximately 4:45 a.m. on August 17th of 1996 and directed to respond to the intersection of Crafford Road and Tower Road in York County, where the body of a white male, who we subsequently identified as Eric Nesbitt, was found.



MS. ADDISON: And your Honor, if I might, I'd like Commonwealth's Exhibit 5 and 6, if we can set that up by Investigator Lyons.

THE COURT: Do you want that set on the tripod?

MS. ADDISON: Yes, sir, that would probably be the easiest.

THE COURT: Did you want to proceed?

[90] MS. ADDISON: Not yet, your Honor, if we might get this set up, because doing it might be a distraction from the testimony.

BY MS. ADDISON:

Q Investigator Lyons, directing your attention to the two exhibits which are behind you, one is Exhibit Number 5 and the other is Exhibit Number 6.

Do you know which one is which, so we can clarify it in the record?

THE BAILIFF: The large one is Number 6 and the small one is Number 5.

MS. ADDISON: The small one being behind.

BY MS. ADDISON:

Q Then directing your attention first to Exhibit Number 5, you mentioned that you were called to Crafford Road. Can you explain what is shown in that exhibit?

A Yes, ma'am, this is a overhead –

THE COURT: That's 6.

MS. ADDISON: I'm sorry, 6.

THE WITNESS: It's an overhead photograph that was done by the York County Computer Support Services, that shows Crafford Road, as well [91] as the intersection Crafford Road with Tower Road.

BY MS. ADDISON:

Q Can you point on Exhibit Number 6 where that intersection is that you're referring to?

A Yes, ma'am, this is Crafford Road and this is the Newport News end of Crafford Road (indicating), which runs along and curves around, and that's the York County end of Crafford Road. This is the intersection right here of Crafford Road and Tower Road (indicating), which is located in York County.

Tower Road is blocked off by a gate right here (indicating), which goes back to a tower site, and Crafford Road is a two-lane, asphalt-paved road that runs from Newport News into York County.

Q And describe for the jury, if you would, please, what type of area that is.

A It's a desolate, dark area, heavily wooded. The nearest houses, there is one house at the Newport News city line approximately seven tenths of a mile up the road, and then the nearest house in York County is approximately a mile and two tenths up the road from this location at this intersection (indicating).



[92] Q And the exhibit behind, which I guess that's Exhibit Number 5, can you describe that, if you would, please.

A This is a computer printout of the area of all of Lackey and Crafford Road. And in this black box area (indicating), this shows again the intersection of Tower Road and Crafford Road. And this shows where it is all surrounded by trees, which is part of the Newport News water shed property.

Q You said that you were called to that intersection, that area of York County, on August 17th, approximately what time?

A Approximately 4:45 a.m. is when I received the call. I arrived on the scene at approximately 5:15 a.m.

Q And when you arrived there, who was present?

A Lieutenant Holloway, who was the shift lieutenant, and Sergeant Diggs and Investigator Kimber Extine, all with the York County Sheriff's Office.

Q What did you find at the scene?

A Once I arrived on the scene, there was a white male lying facedown more onto the Tower [93] Road part of the intersection of – he was lying facedown on the asphalt portion. There were several three-by-five cards which were covering items of evidence that were previously identified by Investigator Extine.

The white male had on a white T-shirt and blue jeans, dark colored pants. And we could tell that the front of the shirt was covered with a red substance that appeared to be blood.

Q What, if you recall, were the weather conditions that morning?

A It was approximately 72 degrees that morning. It was quite humid. There was a light mist in the air. I don't know if you would classify it as a fog, it was between a fog and an actual mist. It had rained up until about midnight of that – earlier that morning, but it had been dry. And the victim's clothing was dry with the exception of the areas that were blood stained.

Q And how, if you did, identify the body that you found there?

A He was identified through a pay stub that was in one of his pants pockets, as well as identification that was subsequently recovered from his barracks room on Langley Air Force Base.

[94] Q Did you take photographs there at the scene?

A Yes, I did. I photographed the crime scene as it was when I arrived and during the course of collection of evidence.

MS. ADDISON: Your Honor, we would at this time like to display to the jury a few of the crime scene photographs. I think it's easiest if the lights at least on this side of the Courtroom were dimmed.

MR. ROGERS: Do we have numbers on that, Madam Commonwealth?

THE COURT: Numbers on the exhibits that are shown?

MS. ADDISON: The exhibits that correspond with these pictures, your Honor, there are certainly more



that we intend to introduce but they are Exhibits 7 and 12 through 18.

MR. ROGERS: Thank you.

MS. ADDISON: Not all of them are displayed, I believe just four of them.

THE COURT: All right. That's 12, 13, 14, 15, 16, 17 and 18.

MR. ROGERS: That was my understanding, your Honor.

[95] (The Commonwealth Attorneys conferred.)

THE WITNESS: Remove the lens cover.

THE COURT: Remove the lens cover. Does that do it?

THE WITNESS: No, sir.

THE COURT: It won't do it. Do you want to get down and do it?

THE WITNESS: I can do that, sir.

THE COURT: Why don't you do that.

(The witness left the witness stand to adjust the computer display.)

THE COURT: Can you see the images okay? Can the jury see the images okay?

THE JURORS: Yes.

THE COURT: Dim the lights in the center of the Courtroom. Turn them all off.

MS. ADDISON: That's better.

BY MS. ADDISON:

Q Describe, if you would, Investigator Lyons, what's shown in the picture here.

A This picture depicts the position [96] that Mr. Nesbitt's body was found in when I arrived at the scene. The glowing kind of diamond-looking shape, that is one of the posts where the fence, the wires connected blocking off Tower Road. Crafford Road runs just to the right, just out of the view of the picture in this particular image.

This is a close-up of Eric Nesbitt as he was found at the scene. And we noted that on the ground his shirt was stained with blood on the bottom side. The top side of his shirt and the back of his shirt, which is visible, was relatively dry, did not appear to have been rained on or had been wet during the night.

This is a picture that was taken just as the sun was coming up after we rolled Mr. Nesbitt's body over. This picture here shows the fence or the wire that blocked off Tower Road and better shows the intersection there where Crafford Road is. Again, Crafford Road would be just to the right of the right side of the picture.

And this is a close-up of Mr. Nesbitt's body. We had lifted up the front of his shirt to view any possible injuries he may have had that was the source of the blood, as well as search his pockets for identifying documents.

[97] Q What, if any, did you see as far as apparent injuries?



A He had numerous injuries that appeared to be bullet holes in his left arm, in his abdomen, in his left lateral chest, as well as there was, I believe, one in his right arm. We later located another injury, bullet injury to his right leg.

MS. ADDISON: Your Honor, I would ask that Investigator Lyons identify Exhibits Number 7 and 12 through 18.

THE COURT: Again, the Court asks if that is 12 through 18, inclusive?

MS. ADDISON: Yes, sir.

THE WITNESS: Exhibit Number 7 is the overall photograph that was taken of the position of Mr. Nesbitt's body, which was photograph number one in the power point presentation.

BY MS. ADDISON:

Q Probably more simply, Investigator Lyons, if you could just review, make sure those are the accurate exhibit numbers, and then you can identify the packet.

A Okay. Exhibit Number 12 is another one of the overall photographs that was [98] taken.

Exhibit 13 is a close-up of one of the photographs that was taken.

Exhibit 14 is also a photograph that was taken at the scene.

Exhibit 15 is a close-up photograph that was taken at the scene.

Sixteen is also a photograph that was taken at the scene.

Seventeen is a photograph, close-up of the victim's face that was taken at the scene.

And 18 is a close-up of the victim's face that was taken at the scene.

I took all of these pictures.

Q Do they all accurately depict what you observed there that morning?

A Yes, they do.

MS. ADDISON: Your Honor, we'd move to readmit Commonwealth's Exhibit 7 and 12 through 18.

MR. ROGERS: No objection, your Honor.

THE COURT: How about 5 and 6?

MS. ADDISON: Yes, sir.

[99] THE COURT: Exhibits 5, 6, 7 –

MR. ROGERS: No objection to that either.

THE COURT: – 12 through 18, inclusive, as Commonwealth's exhibits and make them part of the evidence in the case.

(Commonwealth's Exhibits 5 through 7 and 12 through 18 were received in evidence.)

BY MS. ADDISON:

Q What was done next in your investigation?

A After attending the autopsy, a search was made of Eric Nesbitt's barracks room on Langley Air Force



Base. And based on documents that were found in that room, we contacted Langley Federal Credit Union and Crestar Bank to determine if any transactions or activity had occurred on Mr. Nesbitt's bank account.

Subsequent to our discussion with employees from the bank, we had learned that there was, in fact, transactions on his Crestar Bank account. We learned that on the 17th.

We contacted Crestar Bank again on the afternoon of the 20th and learned that there was [100] a video tape of the ATM transactions that had occurred on the night of the 16th and the early morning of 17th. I went to the Crestar Bank corporate offices in Norfolk and secured and obtained that copy of the video tape as well as some still photos.

Q And what, if anything, did you do with the video tape?

A Once I got ahold of the video tape, I took it back to our office. And using the equipment in our office, I printed still photographs of a number of the frames off of the video tape in order to distribute to area law enforcement agencies and the news media.

MS. ADDISON: Your Honor, we would at this time ask to display for the jury the presentation.

BY MS. ADDISON:

Q Can you describe for the jury the ATM presentation. You developed this, is that correct?

A Yes, I did. The presentation that will be shown is frames off of the ATM video tape. Using equipment in

our office, we played the video tape frame by frame, captured the individual frames. [101] and then digitized them into the computer.

The difference between the computer presentation and the actual video tape itself is during the course of the – during the course of the video tape, there were several times when a motion sensor inside the bank kicked in and switched the camera inside the bank to an empty bank. Those frames were removed, as well as there were several frames that were duplicated, where the time lapse tape took maybe two or three frames in one second. And it would be just duplicate images, so those images were also deleted from the presentation on the computer.

MS. ADDISON: Your Honor, I would ask at this time to show this presentation as far as the ATM video.

THE COURT: What's the exhibit number that this corresponds with?

MS. ADDISON: It corresponds with Exhibit 19, your Honor.

THE WITNESS: May I help Mr. Hahn, your Honor?

THE COURT: The witness would like to run the power point.

THE WITNESS: If you can click on [102] the square. All right. And then the slide-show button in the lower left.

(Photographs were displayed through power point presentation to the jury.)



BY MS. ADDISON:

Q Can you describe what this particular frame is?

A This is one of the first images that we looked at on the video tape. It is an image from August 16th, 1996 at 11:52 p.m. and 14 seconds. This was an image that was taken that shows Mr. Nesbitt making a withdrawal from his bank account at Crestar Bank at the Coliseum Crossing Branch. This withdrawal was in the amount of sixty dollars.

This frame, which was taken on August 17th, this would be at 12:16 a.m. and 30 seconds. This was the first frame that showed Mr. Nesbitt's vehicle coming back into view of the ATM camera at approximately 20 minutes after the prior transaction.

This is the first frame of the video tape which showed the individuals who were with Mr. Nesbitt during this particular transaction.

[103] This individual is William Alfredric Jones, who was identified as the driver. Eric Nesbitt sitting in the middle. And this individual on this side was subsequently identified as being Daryl Atkins.

These frames just go through and show the transaction. These are actually still photographs that were taken one by one.

This frame here shows Mr. Atkins with his ATM card getting ready to do the withdrawal at the machine.

MR. ROGERS: Excuse me just a second.

MS. ADDISON: Mr. Nesbitt.

THE WITNESS: Mr. Nesbitt. Excuse me.

MR. ROGERS: Your Honor, I object to the running commentary by the witness. I think the reason we have photographs is that, as a very wise person said, it's worth a thousand words. We have no objection whatsoever to the jury being shown this. We have interposed no objection to that. And I think the pictures speak for themselves.

For Mr. Lyons, who clearly was not there, to fill in background on this, I think is [104] improper. I think that the pictures will speak for themselves. We have no objection to that, just to his running commentary of it.

MS. ADDISON: We have no problem, just go through the frames.

MR. ROGERS: Thank you.

THE COURT: You're welcome.

(Photographs were further shown on the power point presentation.)

MS. ADDISON: Your Honor, I would at this time ask Investigator Lyons just to identify Exhibit Number 19, the printout of each of these stills.

THE WITNESS: Exhibit Number 19 is the still photographs that were taken from the same video tape that the power point presentation was made from.

MR. ROGERS: And we have no objection to its admissibility, your Honor.

THE COURT: All right. We'll mark that as Commonwealth's 19, make it part of the evidence and the record in the case.



MS. ADDISON: Thank you, your Honor.

[105] I'd also ask that Investigator Lyons be given Exhibit Number 4.

BY MS. ADDISON:

Q If you can, explain to the jury what that exhibit shows.

A Exhibit Number 4, this is an aerial photograph of the area of Hampton, which shows right here (indicating) is the Coliseum Crossing Branch of the Crestar Bank, where the ATM transactions occurred.

Q Did you, in your investigation., subsequently identify where the Defendant, Daryl Atkins, lived?

A Yes, we did. He lived in the apartments, which are located up here at the top of the screen (indicating). He lived in Apartment Number 89, which is located right in about that area right there (indicating), at Sacramento Apartments.

Q And did you have occasion as part of your investigation to drive, in order to check the distance, from the bank to the spot on Crafford Road where Mr. Nesbitt's body was found?

A Yes, I did. On September 15th of 1996 at 5:06 a.m., I went to the Crestar Bank located here, the Coliseum Crossing Branch of [106] Crestar, pulled into the drive-up window at the ATM, left there and drove the most direct route that I could think of from there to Crafford Road, which was out to Mercury Boulevard and then over to I-64, onto I-64 to the Route 238 or Lee Hall Exit off of I-64,

and then Route 238 direct to Crafford Road to the intersection with Tower Road. It took me 24 minutes to make that drive in that direction. It was 18-and-a-half miles.

I only ran into one traffic light on the entire trip and that was the traffic light at Route 238, or Yorktown Road, and Route 143, or Jefferson Avenue.

Q And how long a trip was it?

A It took me 24 minutes to drive it, and that was driving at the posted speed limit.

MS. ADDISON: Thank you. Answer questions Mr. Rogers may have.

MR. ROGERS: I have no questions of Detective Lyons at this time, your Honor. I'd ask that he still been [sic] sequestered.

THE COURT: All right. Do you want Number 4 to come in?

MS. ADDISON: Yes, your Honor. Ask that Number 4 be admitted.

[107] MR. ROGERS: Okay.

THE COURT: The Court will admit Number 4 and 19, without objection, make them part of the record in the case.

(Commonwealth Exhibits Number 4 and 19 were received in evidence.)

THE COURT: Investigator Lyons, you're excused; you're not to leave. Ask that you still be sequestered. Do not discuss your testimony with the other witnesses.

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Next witness.

MS. ADDISON: Doctor Leah Bush.

THE CLERK: Doctor Leah Bush, come into the Courtroom, please. Doctor Leah Bush.

THE COURT: I need to initial 5, 6, 7, 4 and 19.

THE BAILIFF: Yes, sir.

(The witness was duly sworn.)

THE COURT: You may proceed.

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DOCTOR LEAH LINDA ELIZABETH BUSH,

called as a witness by the Commonwealth, having been [108] first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning. Would you state your name, please.

A Doctor Leah Linda Elizabeth Bush.

Q And how are you employed, ma'am?

A I'm the Assistant Chief Medical Examiner for the Commonwealth of Virginia in the Tidewater District.

Q And how long have you been so employed?

A Over ten years now.

Q And are you licensed to practice medicine in the State of Virginia?

A Yes, ma'am.

Q And how long have you been so licensed?

A A I've been licensed to practice medicine for about 15 years.

MS. ADDISON: Your Honor, I believe that we have a stipulation.

[109] MR. ROGERS: So stipulated, Doctor Bush's imminent qualifications, both as a medical doctor and also as a medical examiner specializing and an expert in pathology.

Good to see you again, Doctor Bush.

THE WITNESS: You, too.

THE COURT: Does that adequately state your area of expertise, Doctor Bush?

THE WITNESS: Yes, sir, forensic pathology is my subspecialty area.

THE COURT: All right. The Court, without objection of Defense and with stipulation, certifies this witness as an expert medical examiner, a forensic pathologist.

That means, ladies and gentlemen, that in her areas of expertise she can render opinion evidence.



BY MS. ADDISON:

Q Would you, Doctor Bush, explain to the jury what forensic pathology is.

A Forensic pathology is the study of medicine involving the examination of the body and internal organs to determine natural death – excuse me, natural disease, patterns of injury and cause of [110] death, with reports being generated for court proceedings, such as we have here today.

Q And what specifically are your duties with the State Medical Examiner's Office?

A My duties and responsibilities are to perform autopsies on individuals and investigate the death of individuals that die violent deaths, such as homicide, suicide, or accident, as well as people who are unattended by a physician at the time of their death and people who die under suspicious circumstances.

Q Were you so employed in August of 1996?

A Yes, ma'am, I was.

Q And did you, in fact, perform the autopsy on the body of Eric Michael Nesbitt on August 17th of 1996?

A Yes, ma'am, I did.

Q Did you assign a number to that autopsy and report?

A Yes, I did.

Q What was that?

A T394-96.

MR. ROGERS: No objection to its admissibility, your Honor, to the report.

[111] MS. ADDISON: Your Honor, I would ask to mark for identification Doctor Bush's autopsy report Number 42. There was an accompanying toxicology report previously admitted as Exhibit 45.

THE COURT: All right. Without objection then –

MR. ROGERS: Without objection, your Honor.

THE COURT: – the Court will mark Exhibits 42 and 45 as part of the evidence and the record in the case.

(Commonwealth's Exhibits Number 42 and 45 were received in evidence.)

BY MS. ADDISON:

Q Did you in the course of performing the autopsy, Doctor Bush, take photographs?

A Yes, ma'am, I did.

MS. ADDISON: Your Honor, I'd ask that Doctor Bush be given for identification Exhibits 43-A through and including 43-H.

Additionally, there is Exhibit 44, which is a diagram.

Give the Clerk a moment to catch [112] up, your Honor.

It would be easier for Doctor Bush to have all of the photographs together.

THE COURT: All right.



MR. ROGERS: May I approach the Commonwealth, your Honor?

THE COURT: Yes.

(The Commonwealth and Defense Counsel conferred.)

MR. ROGERS: Thank you, your Honor.

THE COURT: You're welcome. All right.

MS. ADDISON: Do you have all of them now?

BY MS. ADDISON:

Q I would ask, Doctor Bush, if you would, in referring to the number on each of the exhibits, if you can identify them and in so doing and use of the diagram, which is Exhibit 44, explain your findings when you performed the autopsy on Mr. Nesbitt.

A Certainly. The first photograph is 43-A. Do I publish this to the jury?

THE COURT: Show it to them, [113] certainly.

THE WITNESS: This is a photograph of Mr. Nesbitt at the time of the autopsy. As you can see, there are multiple gunshot wounds. There was a total of eight separate gunshot wounds to the thorax or to the torso and extremities. Looking at the photograph and referring to the diagram here – may I stand, please.

THE COURT: You may.

THE WITNESS: Thank you, sir.

THE COURT: Do you have a pointer for her?

We have a laser pointer there, if you would like to use it, I think.

THE WITNESS: I don't see it, sir. I think I can do it with my finger without too much trouble.

As I stated, there were eight separate gunshot wounds, and I'll try to go through them in order. I labeled these gunshot wounds one through eight, not because I know exactly which one came first, but in order to keep track of the entrance wound, the corresponding exit or the corresponding bullet. Some bullets exited the body, re-entered. So in order to keep track of [114] everything, and we know which bullet goes with which exit and so on, I numbered them one through eight.

Referring to the photograph and the diagram, I list gunshot wound number one to the left upper abdomen, and that is located here on the photograph and here on the diagram (indicating). All the entrances are marked in pink. All the exits are marked in green. The bullets that exited and re-entered the body, the re-entries are marked with orange.

So if we look at this, this is the entrance wound, gunshot wound number one, the exit is adjacent, right next to it, and there is a bruise, which is the hatch mark in between the two of the skin. So it entered here, exited here (indicating). That bullet perforated only the subcutaneous tissues. It did not actually penetrate the abdomen or perforate any major organs.

The second gunshot wound, the one I labeled number two, is to the left lateral chest. That's located here



on the diagram and here on Mr. Nesbitt's body (indicating). That bullet produced lethal injury, entering the chest cavity, perforating the left lung, the heart, the right lung, and the bullet then exited the left [115] hemithorax – the right hemithorax, the right side of the body, and the chest wall. So that bullet exited here (indicating). Entered here, perforated both lungs and the heart, exited here (indicating).

That bullet then re-entered the body in the orange hole into Mr. Nesbitt's arm. The bullet perforated his arm, and the bullet was recovered here (indicating). That bullet went from the entire left side of his body across both lungs and the heart, exited the body here (indicating), re-entered in the arm and the bullet was recovered from the arm.

Gunshot wound number three, we can see the entrance wound located here on this photograph, and here on the diagram (indicating). So it's a little more posterior than number two.

Looking at the next photograph, 43-B, we can see the entrance wound located here (indicating), almost behind the arm as shown in that diagram. That bullet produced injury to the left hemithorax, and entered the chest wall, perforated the aorta, which is the largest blood vessel in the body, that's the blood vessel that takes blood from the heart to all the major organs, and it's about the diameter of my two fingers. So it perforated [116] that very large blood vessel, and the right lung. It exited the hemithorax and the skin of the right lateral back, so the bullet then exited here (indicating). Traveled through the chest and exited here (indicating).

On 43-C, we can see some of these a little better. We can see the entrance and exit from gunshot wound number one adjacent to each other with the bruise in between that I described earlier.

Here is gunshot wound number two entrance wound (indicating).

Now, moving on to gunshot wound number four to the left forearm. That bullet entered the body here (indicating), it exited the body here (indicating), and then it re-entered the body in the abdomen. And what we see here, using the photograph, is we see the entry wound here on the forearm. That's 43-A. On 43-B, we see the bullet entering, exiting the forearm and re-entering the abdomen.

BY MS. ADDISON:

Q Excuse me one moment, Doctor Bush. Explain how you determine whether something is an entry or an exit or a re-entry?

A Certainly. Gunshot wounds to the [117] skin have certain characteristics. Entrance wounds tend to be round or oval. They also tend to have what's called an abrasion collar or abrasion margin. And what that refers to as – is when the bullet enters the body, it's traveling in a spiral like this (demonstrating), sort of like a football does when it's thrown. And when it hits the skin, as it goes in, it grinds the skin as it enters. So it punches a hole in the skin but grinds the skin around the hole leaving a little rough collar or rough edge around the bullet wound. So they are round to oval with an abrasion ring or collar.



Exit wounds, on the other hand, have no abrasion collar. Generally speaking, they can be unusual in shape, slit like, have a torn appearance, that type of thing. They also – when you look under the microscope, you can look at the tissues under the microscope and see the tissues being pushed in. You can also find fibers from clothing in the entrance wound side, whereas the exit would be free of that.

Re-entry wounds are a little different. As I said, when bullets are fired they travel in a spiral until they hit something. Once they hit something, whether it be something in the [118] environment, let's say a stop sign or through a piece of glass or something in the body, it knocks them off their nice spin and they start tumbling irregularly. When they re-enter the body then, they don't have a nice, round hole with a nice, little abrasion margin around them, since the bullet's tumbling and not spinning and grinding, it tends to make large, irregular entrance wounds. The abrasions around the entrance wounds are large and irregular.

So that's how we tell the difference, by using those features.

This photograph, I believe I was speaking about 43-B, shows the bullet entering, exiting and re-entering the body. Looking at the diagram when you get a close-up look, you can see that the hole is larger and there is a very large irregular marginal abrasion on that wound.

Gunshot wound number four, after perforating the arm and re-entering the abdomen, the bullet traveled through the abdomen and contuses or bruises the colon, it then transects the right iliac artery and the right iliacus

muscle. And what that refers to is the iliac artery is the artery – once the aorta comes down here it splits into two pieces, [119] one to the right leg, one to the left leg. The right iliac artery is the right-side artery that takes blood from the abdomen into the leg, and it's about the size of my finger in diameter. So it's a pretty large blood vessel. So the bullet transected that artery. The bullet was recovered from the tissues of the right lateral abdomen, and that would be here (indicating). So the bullet perforated the iliac artery and came to rest in the right lateral abdomen.

The next gunshot wound, gunshot wound number five, is located here on the upper arm, the left upper arm (indicating). We can see that wound here on 43-B. We can also see it again on 43-A, located right here (indicating). So that bullet is in the – the entrance wound is in the left upper arm. That bullet, number five, exits the medial left upper arm and produced no injury to vital structures. So that bullet passed through soft tissues and did not produce any significant injury.

Just to show you the location of the bullets that I've already described, I described a bullet being recovered from the arm, number two, and one from the right lateral abdomen, number four. [120] Those bullets I marked with an X because they were right under the skin and I could feel them. So those are the locations marked with X on Mr. Nesbitt's body where those bullets were actually recovered.

The wound, number five to the left upper arm, as I said, perforated only the soft tissues of the arm. It did not produce vital injury.



Number six to the dorsal left hand, we can see that injury in 43-C with the gunshot entering here (indicating) and exiting adjacent. So we see the entrance and exit very well on this photograph right in the dorsal hand. Again, no injury to vital structures, no large arteries or any organs injured on that wound.

Number seven to the right arm, the bullet perforated the soft tissues and muscles of the arm but produced no injury to vital structures before it exited. That bullet wound – on this photograph, we see that on the right arm. This would be the entrance wound here below the elbow on the right arm (indicating) and then the bullet exited a little higher up on the right arm in the back. So it entered here (indicating). And this is [121] the body face-down, and exited slightly above. So it entered below the elbow and exited above the elbow.

THE COURT: What number is that, please?

THE WITNESS: Sir, that is 43-H.

THE COURT: Thank you.

THE WITNESS: Okay. Now, moving on to gunshot wound number eight to the right anterior thigh, that bullet entered the anterior portion or front portion of the right thigh. It traveled left to right perforating the muscle and soft tissue of the thigh, entering here, exiting here (indicating). Again, there were no injuries to vital structures. And this is the photograph, a close-up of the entrance wound, and that is photo number 43-E showing the entrance wound in the thigh anteriorly near the groin.

One photograph we didn't look at was 43-D. And this photograph is just showing the exit and re-entry of

the bullet number two, where it exited the forearm and re-entered the chest.

And lastly, 43-G – in addition to the gunshot wounds, Mr. Nesbitt had lots of scrapes which are in medical terminology called abrasions. Abrasions are scrapes or results of falling on a [122] rough object or having a rough object rubbed against you or struck with a rough object. Most of us are most familiar with children falling on pavement outside on the street and they get a little scrape on their knee. Well, it's the same sort of situation here, the top layer of skin is just rubbed off by scraping against a rough object or, as I said, a rough object scraping against the skin. And we see multiple abrasions on his face, or skin scrapes on his face, including a fairly large linear, or meaning a line like one on the right forehead.

BY MS. ADDISON:

Q Is there a distinction, Doctor Bush, between abrasions and scrapings, as you see there, and injury that results from a blunt force?

A They will appear the same. So there would be no difference looking at the wound itself. They would appear the same. Because they are produced by similar mechanism. The rough object scraping against the skin or the skin scraping against a rough object. So they are produced in the same fashion, and I really can't tell one from the other with any certainty.

Q You mentioned, I believe, there [123] were three gunshot wounds that produced lethal injury, is that correct?



A Yes, ma'am, that's correct.

Q And which three were those again?

A The three gunshot wounds that produced lethal injury were the ones that actually penetrated the abdominal and chest cavities, and those included number two, which was to the left chest that traveled through the body perforating both lungs and the heart. That's the one that re-entered the arm and the bullet was recovered from the arm.

Gunshot wound number three to the left lateral back, which is shown there in the lateral aspect up here, the pink one, in a straight line to the left of the back. That bullet perforated the right lung and the aorta, the largest blood vessel in the body. That bullet exited the skin and was not recovered at autopsy.

Then gunshot wound number four, which perforated the arm and then re-entered the abdomen with the large re-entry on the lower abdominal wall, that bullet perforated the iliac artery, which, again, was the large artery running through the lower abdomen and groin area.

[124] So those three wounds would have produced lethal injury. Had he only received one of those three, he could have died from any one of those three. But the combination certainly of the three was lethal.

Q And are you familiar with the term defensive injuries?

A Yes, ma'am, I am.

Q Can you explain what that is to the jury.

A Defensive injuries are injuries – generally they'll be scrapes or abrasions or they can be bruises, contusions, or they can also be knife wounds or gunshot wounds. What that refers to is they are placed – the injuries are located on areas of the body that may be used in a defensive manner. For example, if somebody is coming at you with a knife, you may raise your arms in order to block a blow. If you are on the ground you, may raise your legs in an attempt to shield the vital parts of your body, your head and abdomen from some sort of assault.

So defensive injuries are any injuries on the outer aspects of the arms and hands and also can be on the legs that indicate the person [125] may have put up a struggle, put up a defensive sort of move by putting their arms, as I said, or legs over the vital areas of the body, the head and abdomen.

Q And in your autopsy on Mr. Nesbitt, did you find any defensive injuries?

A No, ma'am, there were nothing that were characteristic of defense wounds other than maybe the gunshot wound to the hand and forearm, if he was possibly putting them up. But there were no scrapes or bruises on the aspects of the arms or hands, only the gunshot wounds through the arms and hands which could certainly be as a result of putting an arm or hand up.

Q You've described the injury to each organ of each of those three lethal gunshots. Can you describe for the jury the effect that those gunshot wounds would have on a person?



A Yes, ma'am. All three of those gunshot wounds would produce profuse bleeding. Certainly the one through the heart and the aorta the most bleeding. And the ones through the lungs, since the lungs are basically air-filled bags supported by blood and fibrous tissue cause extensive bleeding, also.

[126] None of these wounds were immediately lethal. None of them perforated a portion of the brain called the brain stem, which would produce immediate death. So these injuries would have been incapacitating. They would be painful. He may have survived for several minutes prior to dying from basically bleeding to death internally from the wounds.

Q Would he have been able to move at all during that time?

A Yes, ma'am, there is – none of these injuries would have caused him to be immediately unconscious or caused him to be paralyzed in any way. So, yes, he would be able to move for some period of time prior to lapsing into unconsciousness from loss of blood.

Q And you said there is no way to know which of these shots was first and which was last?

A No, ma'am, I can't tell.

Q Even if assuming one of these three lethal shots was first, can you approximate how long he would have lived or remained conscious?

A Well, it's certainly variable. He certainly could have remained conscious for several [127] minutes, though it certainly could be shorter. I really can't say. But

the most would be a few minutes; at the very least a few moments.

MS. ADDISON: Thank you.

Your Honor, I would move to admit each of the exhibits that Doctor Bush has used, 42, 43-A through H, 44, 45. She may not have identified the toxicology report.

THE COURT: We have that in. It's already been introduced.

MR. ROGERS: That's already been introduced and no objection to the other exhibits as presented by the Commonwealth.

THE COURT: All right. Make that 43-A through H part of the record and 44, the diagram, as part of the record, without objection. All right.

(Commonwealth's Exhibits Number 43-A through Hand 44 were received in evidence.)

MS. ADDISON: If I might see – the Clerk has one more we probably should have used.

MR. ROGERS: Uh-huh.

MS. ADDISON: Ask if Doctor Bush can identify that. It might be similar to one [128] that's in the other packet she described.

THE WITNESS: Yes, ma'am, this is Exhibit 9. I believe I mentioned earlier, I think the last photograph I showed in the series showed injuries – it may be in a slightly different angle, but it's the same injury, with numerous scrapes or abrasions present on the head, including a fairly large one here in the forehead near the hairline.



MS. ADDISON: I would move to admit Exhibit 9, your Honor.

MR. ROGERS: No objection, your Honor.

THE COURT: All right. Mark it Exhibit Number 9, make it part of the evidence and the record in the case.

(Commonwealth's Exhibit Number 9 was received in evidence.)

MS. ADDISON: I have no further questions of Doctor Bush.

THE COURT: Your witness.

MR. ROGERS: If the Court please, Defense has no questions of Doctor Bush. And she can be excused.

THE COURT: Thank you, Doctor

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[Entry Of Disposition Orders From Priors]

[136] convictions.

Again, we have provided the Court with a copy.

THE COURT: Are they to be marked separately, do you want them or not, the sentencing order?

MS. ADDISON: They are disposition orders. They can be marked as B and C, your Honor.

THE COURT: Okay.

MR. ROGERS: We don't have objection to that, if the Court please.

THE COURT: All right. So marked and made part of the record and the evidence in the case.

(Commonwealth's Exhibits Number 73-A, B and C were received in evidence.)

MS. ADDISON: Commonwealth would call Dennis Tuinei.

THE CLERK: Dennis Tuinei, come into the Courtroom, please. Dennis Tuinei.

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[138] Dennis Tuinei

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Stoops, John Hultquist and Scott Thompson.

Q And approximately what time was that?

A It was around midnight.

Q And what were you doing there?

A Using the pay phone.

Q And did you have occasion at that time to come in contact with the Defendant in this matter, Daryl Atkins?

A I sure did.

Q And can you describe for the jury what happened?

A Yeah. I was waiting for my friend to get off the pay phone when three black gentlemen approached us.



They were just standing there at first, and we thought they were there to use the phone. We got off the phone and went back to our car, and someone said, "Don't get in the car yet." And we turned around, and one of them had a gun pointed at us. And then they told us to get on the ground and put the gun in my back.

And then he went – Mr. Atkins went up to me and went through my pockets and through my shirt and took my pager and five dollars, and then he went around to the rest of my friends. [139] Then after he was done, he came back to me and stood over me for a little bit and looked at me. I looked back up at him. He said, "What the fuck you looking at?" I didn't say anything. It was pretty obvious what I was looking, at, it was him. And then he hit me in the back of the head with a bottle.

Q Did you have any injuries as a result of that?

A No, huh-uh, as a matter of fact, the bottle hit me in the back of the head and bounced off. And then after that, I went to engage him in hand-to-hand combat and he ran.

MS. ADDISON: Answer any questions that Mr. Rogers may have.

MR. ROGERS: Thank you, Madam Commonwealth.

CROSS-EXAMINATION

BY MR. ROGERS:

Q Mr. Tuinei?

A Tuinei.

Q Excuse me. I'm sorry. Tuinei. Okay. Daryl Atkins was not the one with the gun?

A No, he wasn't.

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[143] Shane Stoops

A We were at the pay phone at Almost-a-Bank. And we were on the phone, and we were all standing outside the car waiting for my friend to get off the phone. And we were approached by – well, there was three, and a guy standing over at the corner by the car. They came up and they asked if we were done with the phone. So we were like, almost, you know.

So my friend hangs up the phone when he was done, and he started to turn around, and one of the guys pulled a gun out and he was like, "You know what this is, you know what this is." So, you know, I backed up a little bit. And they came up and got my wallet.

And Dennis and Jeremy were on the other side of the car. And that's where Mr. Atkins was. And they took my money and everything, and I was sitting there looking around.

And they had Dennis on the ground. And he told Dennis not to look, "Don't look at me." Dennis looked back up, and he hit him in the head with a bottle. And then Dennis jumped up, and he ran off.

Q How much money was taken from you?

A From me, about ninety dollars.

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[146] John C. Hultquist

* * *

Scott Thompson.

Q And on that particular evening, did you come in contact with the Defendant in this matter, Daryl Atkins?

A Yes, ma'am.

Q And can you describe for the jury what happened?

A My friends and I stopped to use the pay phone at that Almost-a-Bank, and we were approached by three males. And they had surrounded us at the phone, I mean – yeah, at the pay phone, and then we had asked if they needed to use the phone, and they sort of said yeah, you know. So we got off the phone and proceeded to get in my car, and that's when they told us to stop, you know, and get on the ground. And that was it.

Q And what happened after you got on the ground?

A Then they, you know, took our wallets. And – and then I saw the Defendant hit my friend Dennis on the head with a bottle of some sort.

Q And how much money was taken from you?

A From me?

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[155] Kevin Phillips

Q Mr. Phillips, how are you employed?

A I am a jail officer in Portsmouth.

Q Okay. And directing your attention to June of 1996, how were you employed then?

A I was a delivery driver for Chanello's Pizza.

Q And specifically June 28th of 1996 were you still employed and working?

A Yes.

Q Did you on that evening have contact with the Defendant in this matter, Daryl Atkins?

A Yes, I did.

Q Describe for the jury, please, what happened that night.

A I had just gotten off work and they asked me to deliver one more run. So I took it to a house on Sacramento. I was instructed by my employer that if everything looked good to go ahead and deliver it, because they had had some problems.

When I got to the house, there was a man standing between the screen door and the wooden door of the house waving me down to come in.

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[161] MR. ROGERS: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. ROGERS:

Q Mr. Phillips, this was on June 28th of 1996?

A Yes.

Q Okay. And you said that there were four men involved in this robbery deal, is that correct?

A Correct.

Q And I believe your testimony was that there was one individual with a gun, isn't that true?

A Correct.

Q Okay. And that individual was not Daryl Atkins, was it?

A No.

Q Now, the man with the gun, who was not Daryl Atkins, was a passenger in the car?

A Correct.

Q How many people were in the car with you on the drive from the apartment area over

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